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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 553.

WIRT FRANKLIN, PLAINTIFF IN ERROR,

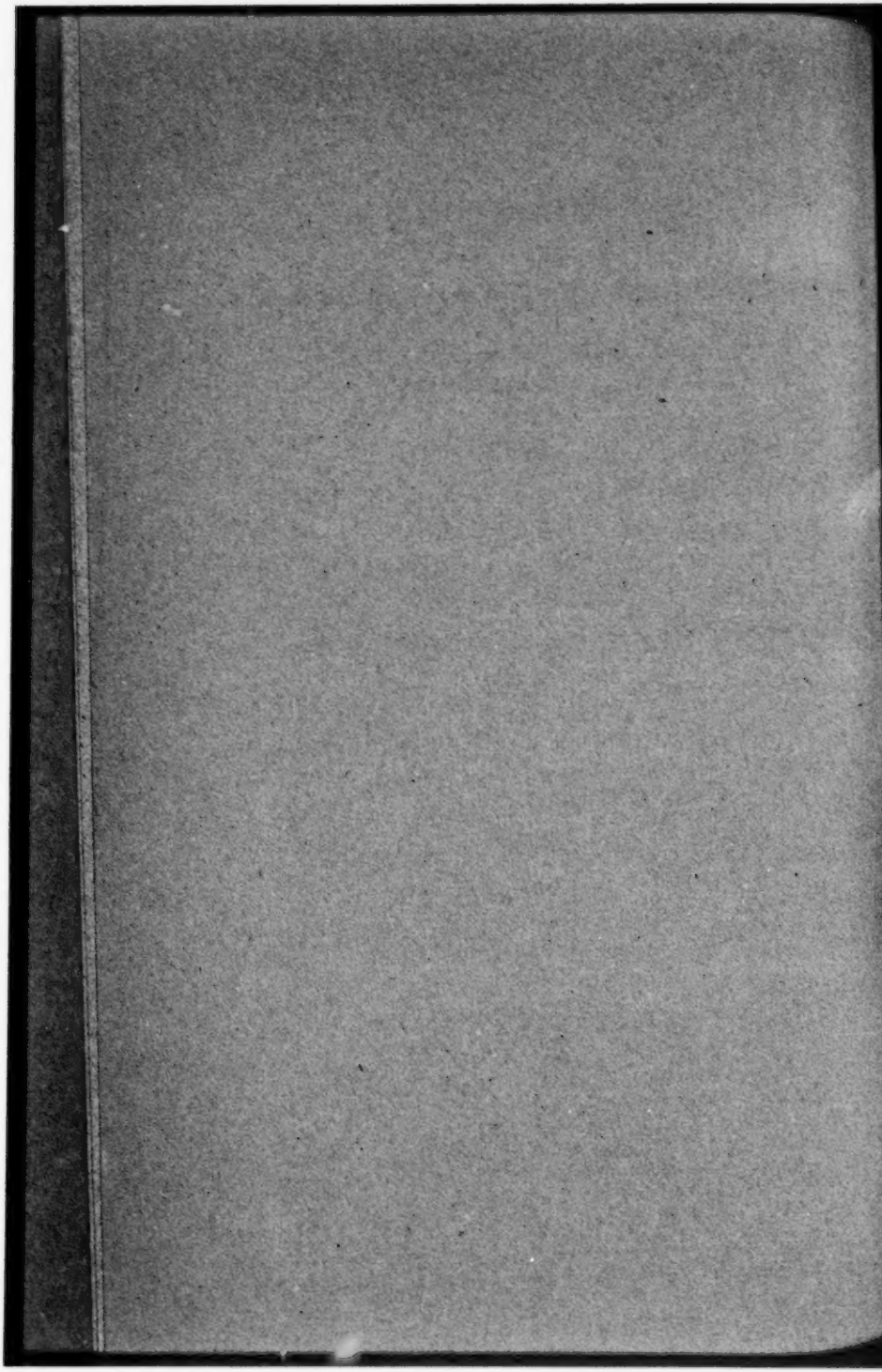
vs.

C. S. LYNCH AND O. A. SIMMONS.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

FILED MAY 15, 1913.

(23,692)



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6 *Return to Writ.*

STATE OF OKLAHOMA,
Supreme Court, ss:

In obedience to the commands of the within writ, I hereby transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Supreme Court of Oklahoma, in Oklahoma City, Oklahoma, this 2nd day of May, 1913.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of Oklahoma.
By JESSIE PARDOE, *Deputy.*

1 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to C. S. Lynch and O. A. Simmons, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Oklahoma, wherein Wirt Franklin is Plaintiff in error, and you, the said C. S. Lynch and O. A. Simmons, are Defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witnedd, the Chief Justice of the Supreme Court of the State of Oklahoma, this 7th day of April, 1913.

SAMUEL W. HAYES,
Chief Justice of the Supreme Court of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL, *Clerk.*
By JESSIE PARDOE, *Deputy.*

STATE OF OKLAHOMA,
County of Oklahoma:

I, the undersigned attorney of record for the defendants in error of the above entitled cause, hereby acknowledge the service of the above Citation.

Dated this 29 day of April, 1913.

S. T. BLEDSOE,
Attorney for Defendants in Error.

2 In the Supreme Court of the United States, at Washington, D. C.

WIRT FRANKLIN, Plaintiff in Error.
vs.
C. S. LYNCH et al., Defendants in Error.

Petition for Writ of Error.

To the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States and the Associate Justices of said court:

Now comes Wirt Franklin, Plaintiff in Error, who was Defendant in Error in the Supreme Court of the State of Oklahoma, and respectfully show unto this Honorable Court, that on the 22nd day of October 1910, he filed in the District Court of McClain County, Oklahoma, his petition, wherein it was alleged that he was the owner of the title in fee of that certain land described in said petition; that the same was wild land and that no one was in possession of the same; that the Defendants in Error C. S. Lynch and O. A. Simmons had of record in the Office of the Register of Deeds wherein said land was situated, a deed of conveyance, but that said deed conveyed no title unto the said Defendants in Error, C. S. Lynch and O. A. Simmons, and that the same constitute a cloud on the title of this Plaintiff in Error, Wirt Franklin, and to this petition so filed as aforesaid, the Defendants in Error herein, filed in said District Court of McClain County, Oklahoma, their demurrer, challenging the sufficiency of Plaintiff in Error's said petition as filed in the District Court aforesaid, by reason of the fact that the conveyance relied upon and attached to Plaintiffs in Error's original petition filed in the District Court of McClain — Oklahoma were in violation of the Choctaw-Chickasaw Supplemental Treaty ratified by Congress of the United States September 25th, 1902 and was in violation of the previous Treaties and Agreements of said Choctaw-Chickasaw Nations and the United States and the various laws of the United States.

3

Your Petitioner would further respectfully represent and show to this Honorable Court, that on the 8th. day of June, 1911, the District Court of McClain County, Oklahoma, over ruled the demurrer of the Defendants in Error, whereupon the said Defendants in Error failed to plead further and the trial court rendered judgment in favor of the Plaintiff in Error herein, and from which said judgment, the Defendants in Error appealed to the Honorable Supreme Court of the State of Oklahoma, and to wit, on the — day of ——, 1913, a final decree and judgment was made and entered in this cause in the Supreme Court of the State of Oklahoma, whereby it was adjudged and decreed, that the judgment of the District Court of McClain County, Oklahoma be reversed and the cause be dismissed.

Plaintiff in Error would further respectfully represent and state

unto this Honorable Court, that in the trial of this cause in the District Court of McClain County, Oklahoma, and in the Supreme Court of the State of Oklahoma, and which said Supreme Court of the State of Oklahoma, is the court of last resort in said State of Oklahoma, that in the record and proceedings and transcript to which a reference is here made, manifest error occurred and was committed by the Supreme Court of the State of Oklahoma to the damage of the Plaintiff in Error, whereof, the Plaintiff in Error feels himself aggrieved.

Plaintiff in Error would further respectfully represent and state to this Honorable Court, that in the record, proceedings and transcript, it will appear, that there was drawn in question, the construction of the Act of Congress of April 21st. 1904, (33 Stat. L. 189); also the construction of Chapter 27 of the Digest of the Statutes of Arkansas, known as Mansfield's Digest of 1884, which said Chapter 27 of Mansfield's Digest was put in force in the Indian Territory by the Act of Congress of February 19th. 1903 (32 Stat. L. 841); also the construction of the Act of Congress of July 1st. 1902, (32 Stat. L. 641): Also the Construction of the Act of Congress of June 28th. 1898 (30 Stat. L. 495).

Plaintiff in Error would further respectfully represent and
4 state to this Honorable Court, that it was necessary to construe said Acts of Congress Supra by the Supreme Court of the State of Oklahoma in order to render the final decree and judgment that was rendered herein.

Wherefore your Petitioner, feeling aggrieved by said final decree and judgment of the Supreme Court of the State of Oklahoma, appeals from said judgment and the whole thereof, upon the reasons specified in the assignment of errors filed herewith and prays the appeal may be allowed; that a writ of error be granted, and that the said final decree and judgment, all pleadings, mandate, orders, transcript, record and other proceedings had in said cause, may be transmitted to the Supreme Court of the United States, to the end that this Honorable Court may hear said cause anew, and that the said judgment and decree of the Supreme Court of the State of Oklahoma be reversed, and that a decree may be made herein remanding said cause for further proceedings in the court below, or that such other decree may be made as to this Honorable Court may seem just and proper.

H. A. LEDBETTER,
Attorney for Plaintiff in Error.

Filed Apr. 7, 1913. W. H. L. Campbell, Clerk.

5 In the Supreme Court of the United States, at Washington, D. C.

WIRT FRANKLIN, Plaintiff in Error.
vs.
C. S. LYNCH et al., Defendants in Error.

Assignment of Errors.

Plaintiff in Error Wirt Franklin complaining of the Defendants in Error C. S. Lynch and O. A. Simmons states that in the Supreme Court of the State of Oklahoma, a final decree and judgment was rendered against this Plaintiff in Error and in favor of the Defendants in Error herein, and from which said judgment, the Plaintiff in Error having appealed to this Honorable Court, and a writ of error having been duly issued, signed by the United States District Clerk for the Western District of Oklahoma and by the Honorable Samuel W. Hayes, Chief Justice of the Supreme Court of the State of Oklahoma, Now therefore, the premises considered, the Plaintiff in Error Wirt Franklin assigns as error of the Honorable Supreme Court of the State of Oklahoma, the following.

First. The Supreme Court of the State of Oklahoma erred in deciding that Under the Act of Congress of April 21st. 1904, (33 Stat. L. 189) the restriction upon the right to alienate by Emma Sisney was not removed.

Second. The Supreme Court of the State of Oklahoma erred in deciding that Chapter 27 of Mansfield of the Statutes of Arkansas had no application to Emma Sisney, and erred in refusing to apply said Chapter 27 of Mansfield Digest to the conveyances relied upon, which were made by Emma Sisney to the Plaintiff in Error.

Third. The Supreme Court to the State of Oklahoma erred in deciding that the conveyances relied upon by the Plaintiff in Error were in contravention of the Act of Congress of July 1st. 1902 (32 Stat. L. 841).

Fourth. The Supreme Court of the State of Oklahoma
6 erred in deciding that the conveyances relied upon by the Plaintiff in Error were in contravention of the Act of Congress of June 28th. 1898, (30 Stat. L. 495).

Fifth. The Supreme Court of the State of Oklahoma erred in deciding and holding that the conveyances relied upon by the Plaintiff in Error were forbidden by the Treaties between the Chickasaws and Choctaws and the United States and the Acts of Congress.

Sixth. The Supreme Court of the State of Oklahoma erred in deciding and holding that the Plaintiff in Error had no title to the land in controversy.

Seventh. The Supreme Court of the State of Oklahoma erred in deciding and holding that Emma Sisney could make no valid conveyance of her surplus land before making a selection thereof.

Eighth. The Supreme Court of the State of Oklahoma erred in reversing the judgment of the trial court in this cause.

For all of which reasons, Plaintiff in Error prays that this cause be reversed and that he have all other relief that he may be entitled.

H. A. LEDBETTER,
Attorney for Plaintiff in Error.

Filed Apr. 7, 1913. W. H. L. Campbell, Clerk.

7 [Endorsed:] No. 2906. In the Supreme Court, of the United States. Wirt Franklin, Plaintiff in Error, vs. C. S. Lynch et al., Defendants in Error. Petition for Writ of Error also Assignment of Errors. H. A. Ledbetter, Ardmore, Okla., Attorney for Plaintiff in Error.

8 In the Supreme Court of the United States, at Washington, D. C.

WIRT FRANKLIN, Plaintiff in Error,
vs.
C. S. LYNCH et al., Defendants in Error.

THE UNITED STATES OF AMERICA,
State of Oklahoma, ss:

The President of the United States of America, to the Honorable Samuel W. Hayes, Chief Justice of the Supreme Court of the State of Oklahoma and the Associate Justices of said Court and to the Clerk of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record of the proceedings, as also in the rendition of the judgment of a plea which is in said Supreme Court of the State of Oklahoma, before you, being the highest court of law and equity of the said State in which a decision can be had in the said suit between C. S. Lynch and O. A. Simmons as Plaintiffs in Error in the Supreme Court of said State, wherein a final decree and judgment was rendered in said cause in favor of the Defendants in Error herein, C. S. Lynch and O. A. Simmons and against the Plaintiff in Error herein, Wirt Franklin, reversing and dismissing the action of the Plaintiff in Error against the Defendant in Error herein, and adjudging that this Plaintiff in Error take nothing by his said petition in error, and wherein, in said judgment of the said Supreme Court of the State of Oklahoma there was drawn in question, the construction of certain Acts of Congress and certain Treaties between the Choctaws and Chickasaws and the United States, and by said judgment, it was necessary for the Supreme Court of the State of Oklahoma to construe said Acts of Congress and Treaties aforesaid in order to render judgment therein, and it appearing that manifest error has happened to the damage of the Plaintiff in Error Wirt Franklin, as by his petition and assignment of errors appears, and we being willing that the error, if any hath been committed, should

be duly and speedily corrected and full justice done to the
9 parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the copy of the record of proceedings aforesaid, with all things concerning the same, duly authnticated and verified to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., at the Supreme Court, within 30 days of the date hereof, that said record of proceedings aforesaid, being inspected by the Supreme Court of the United States, it may cause further to be done therein to correct that error what of right and according to the Laws and Customs of the United States should be done.

Witness, the Honorable Samuel W. Hayes, Chief Justice of the Supreme Court of the State of Oklahoma, this 7th day of April, 1913.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk U. S. District Court,
Western District of Oklahoma.

Allowed.

SAMUEL W. HAYES,
Chief Justice Supreme Court, State of Oklahoma.

[Seal Supreme Court, State of Oklahoma.]

Attest:

W. H. L. CAMPBELL, *Clerk,*
By JESSIE PARDOE, *Deputy.*

10 [Endorsed:] No. 2906. In the Supreme Court of United States. Wirt Franklin, plaintiff in error, vs. C. S. Lynch et al., Defendants in Error. Writ of Error. H. A. Ledbetter, Ardmore, Okla., Attorney for Plaintiff in Error. Filed Apr. 12, 1913. W. H. L. Campbell, Clerk.

11 In the Supreme Court of the State of Oklahoma.

No. 2906.

WIRT FRANKLIN, Plaintiff in Error,
vs.
C. S. LYNCH et al., Defendants in Error.

Order Fixing Amount of Bond.

A bond to supersede the judgment rendered herein is hereby fixed in the sum of One Thousand Dollars ($1,000.00) and when said bond is executed by Wirt Franklin to C. S. Lynch and O. A. Sim-

mons, in said amount, and approved, the same shall act as a supersedeas.

Dated this the 29th day of April, 1913.

SAMUEL W. HAYES,
Chief Justice of the Supreme Court of Oklahoma.

Attest:

[SEAL.] W. H. L. CAMPBELL, *Clerk,*
By JESSIE PARDOE, *Deputy.*

Filed Apr. 29, 1913. W. H. L. Campbell, Clerk.

12 *Bond.*

WIRT FRANKLIN, Plaintiff in Error,
vs.
C. S. LYNCH and O. A. SIMMONS, Defendants in Error.

Know all men by these presents, That we, Wirt Franklin as principal and S. A. Apple and J. R. Dexter as sureties, are held and firmly bound unto C. S. Lynch and O. A. Simmons in the sum of ($1,000.00) One Thousand Dollars, to be paid to said O. A. Simmons and C. S. Lynch, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated this 30th day of April, 1913.

Whereas, the above-named plaintiff in error seeks to prosecute his writ of error to the U. S. Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Oklahoma.

Now, therefore, The condition of this obligation is such, that if the above named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

[SEAL.] WIRT FRANKLIN.
S. A. APPLE.
J. R. DEXTER.

STATE OF OKLAHOMA,
Carter County, ss:

S. A. Apple and J. R. Dexter being each duly sworn, on oath depose and say: We are each of lawful age and are citizens of the State of Oklahoma, and know the contents of the foregoing instrument to which we have attached our names.

We each for himself say we are worth the sum of $1,000/00
13 over and above all debts, liabilities and exemptions.

S. A. APPLE.
J. R. DEXTER.

Subscribed to and sworn to before me this 30th day of April, 1913.

F. L. COFFLAND,
Notary Public, Carter County.

My commission expires Sept. 23 1914.

[SEAL.]

Bond approved, and to operate as a supersedeas.
Dated 2nd day of May, 1913.

SAMUEL W. HAYES,
Chief Justice, Supreme Court of Oklahoma.

Filed May 2, 1913. W. H. L. Campbell, Clerk.

14 Filed Aug. 4, 1911. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. —.

C. S. LYNCH et al., Plaintiff in Error,
vs.
WIRT FRANKLIN, Defendant in Error.

Petition in Error.

The Plaintiffs in Error, C. S. Lynch and O. A. Simmons, respectfully state that in the proceedings had in the trial court numerous errors were committed to their prejudice, resulting in a judgment adverse to them when said judgment should have been in their favor; that all of the said errors are apparent of record in the case-made herein, but Plaintiffs in Error assign the following as being most highly prejudicial.

First. That the trial court erred in over-ruling the demurrer of Plaintiffs in Error to the amended petition of Defendant in Error.

Second. That the trial court erred in rendering judgment for the Defendant in Error and against the Plaintiffs in Error, thereby holding the title of Defendant in Error superior to the title of Plaintiffs in Error.

Third. The trial court erred in holding that the memorandum of agreement, marked Exhibit "A" to plaintiff's (Defendant in error here) amended petition, executed the 16th day of October, 1905, and the purported warranty deed, marked Exhibit "B" dated the 16th day of October, 1905, were sufficient to pass title to the Defendant in Error to the premises in controversy.

Fourth. The trial court erred in not holding that both of said agreements were void because made before restrictions upon alienation of the surplus lands of the said Emmer Sisney had been re-

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moved and before said lands had been allotted or were alienable.

15 Fifth. That the trial court erred in failing to sustain the first ground of the demurrer of Plaintiffs in Error to the amended petition of the Defendant in Error, which ground is as follows:

"That said amended petition does not state facts sufficient to constitute a cause of action."

Sixth. That the trial court erred in failing to sustain the second ground of the demurrer of Plaintiffs in Error to the amended petition of the Defendant in Error, which ground is as follows:

"That said amended petition discloses upon the face thereof that the conveyance under which plaintiff claims was made prior to the enrollment of Emmer Sisney and prior to the selection of said land in allotment and at a time when a contract to convey the same was void as being violation of the Choctaw-Chickasaw Supplemental Agreement and previous treatise and agreements between the said Nations and the United States and the various laws of the United States."

Seventh. That the trial court erred in failing to sustain the third ground of the demurrer of Plaintiffs in Error to the amended petition of the Defendant in Error, which ground is as follows:

"Because it appears from said petition and the Exhibits thereto attached and made a part thereof, that said pretended conveyance was made prior to the selection of said land in allotment and could amount to nothing more than a sale of an individual interest in tribal lands, the making of which was prohibited by the laws of the United States and the treaties and agreements of said tribes."

Eighth. That the trial court erred in failing to sustain the fourth ground of the demurrer of Plaintiffs in Error to the amended petition of the Defendant in Error, which ground is as follows:

"That said complaint further fails to state a cause of action because it appears therefrom that the said Emmer Sisney could not, at the time said pretended conveyance was made, lawfully alienate any interest she might have had in the unallotted lands of the Choctaw-Chickasaw tribe of Indians."

Ninth. That trial court erred in holding that the amended petition of the Defendant in Error was sufficient to entitle him to a judgment against the Plaintiffs in Error.

Tenth. The trial court erred in holding that the rights of the Defendant in Error were superior to those of the Plaintiffs in Error under the facts set forth in the petition of the Defendant in Error.

Eleventh. The trial court erred in rendering judgment against the Plaintiffs in Error.

16 & 17 Twelfth. The trial court erred in over-ruling the motion of Plaintiffs in Error for new trial in the cause.

For all of which reasons the Plaintiffs in Error pray that the judgment of the trial court be reversed and the judgment be here

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rendered in their behalf, and for such other and further relief as this Court may in equity and good conscience award them.

COTTINGHAM & BLEDSOE,
Attorney- for Plaintiffs in Error.

Filed Aug. 4, 1911. W. H. L. Campbell, Clerk.

18 In the Supreme Court of the State of Oklahoma.

No. —.

C. S. LYNCH et al., Plaintiff in Error,
vs.
WIRT FRANKLIN, Defendant in Error.

Case Made.

19 In the District Court in and for the Fourteenth Judicial District, Sitting at Purcell, McClain County, State of Oklahoma.

No. —.

WIRT FRANKLIN, Plaintiff,
vs.
C. S. LYNCH et al., Defendants.

Be it remembered, That on the 22nd day of October, 1910, plaintiff filed his amended petition herein, in lieu of the original petition, which amended petition is in words and figures as follows, to-wit:

20 In and for the Fourteenth Judicial District, Sitting at Purcell, McClain County, Oklahoma.

WIRT FRANKLIN, Plaintiff,
vs.
C. S. LYNCH AND BROTHERS, Defendant.

Amended Petition.

Comes now the plaintiff and by leave of court being first had and obtained, files this his amended petition in lieu of all other pleadings heretofore filed in this action.

The plaintiff, Wirt Franklin, complains of the defendants C. S. Lynch and O. A. Simmons, and states that all of the parties of this action are residents of the State of Oklahoma and citizens of the United States, and are not members of any Indian Nation or Tribe, and that the lands hereinafter described are located within the jurisdiction of this court.

For cause of action plaintiff states that heretofore, to wit, on or

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about the 16th day of October, 1905, he and one S. A. Apple were employed as attorneys and agents to represent one Emmer Sisney seeking to establish the right of said Emmer Sisney to membership in the Choctaw Tribe of Indians by intermarriage, and to secure her enrollment as such citizen, a copy of which contract is hereto attached, made a part hereof and marked Exhibit "A." And at the time of making said contract said Emmery Sisney made, executed and delivered to this plaintiff and said S. A. Apple, a conveyance to all the land that she, the said Emmer Sisney, would be entitled to take and receive, other than her homestead, if she should be enrolled and permitted to take an allotment in the Choctaw or Chickasaw Nation, a copy of which conveyance is hereto attached, made
21 a part hereof and marked Exhibit "B." That the consideration of said conveyance was the obligation made by the said Apple and Franklin to represent her in the matter of her application to be enrolled as a member of the Choctaw Tribe of Indians.

That plaintiff further states that at the time of the execution of said conveyance, marked Exhibits "A" and "B," the said Emmer Sisney was not enrolled as an intermarried citizen of the Choctaw Tribe of Indians, or otherwise, but that application had been made to have her name placed upon the citizenship rolls in the year 1899. That at the time of the making of said conveyances to the said Apple and Franklin the said Emmer Sisney was not in possession of any lands of the Choctaw and Chickasaw Nations holding the same for the purpose of allotment, or otherwise, and therefore she was unable at the time of the making of the said deed to include therein a description of the lands that she expected to subsequently acquire, and have allotted to her, and convey to said Apple and Franklin.

Plaintiff further states that on Nov. 26, 1906, the said Emmer Sisney was placed upon the final rolls of the Choctaw Tribe of Indians as an intermarried citizen of the Choctaw Nation, and her enrollment duly approved by the Secretary of the Interior, and that to-wit, on the 12th day of December, 1906, the said Emmer Sisney filed upon and selected as her land, exclusive of her homestead and commonly known as her surplus, the following described lands, to wit:

N. E. ¼ of the S. E. ¼ of the S. E. ¼ Sec. 6; S. ½ of the S. E. ¼ of the S. W. ¼ Sec. 10; N. E. ¼ of the N. E. ¼ of the N. W. ¼, Sec. 15, Township 8 North, Range 3 West; and the E. ½ of the N. E. ¼ of the S. E. ¼ and the S. W. ¼ of the N. E. ¼ of the S. E. ¼ of the N. W. ¼ of the N. W. ¼; and the S. W. ¼ of the N. W. ¼ of the N. W. ¼ and the N. E. ¼ of the N. W. ¼ of the S. W. ¼, Sec. 34, Township 9 North, Range 4 West, containing 110 acres, more or less.

And that certificate of allotment and patent were issued thereto in due course; said certificate bearing date of Dec. 12, 1906, and that patent has been duly issued and recorded as required by
22 law and delivered to the said Emmer Sisney.

Plaintiff further states that on the 19th of January, 1907, the said S. A. Apple, joined by his wife, Byron W. Apple, conveyed all of his right, title, claim and interest into said lands to the plaintiff

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herein, a copy of which conveyance is hereto attached, made a part hereof, and marked Exhibit "C."

Plaintiff further states that at the time of the making of the original contract herein, as well as at the time of the making of the conveyance, which is a warranty deed in form, the said Emmer Sisney was a single woman and was such single woman at the time of the selection of the lands herein, and still is a single woman.

Plaintiff further alleges that on the 14th day of December, 1906, the said Emmer Sisney for the consideration therein mentioned made, executed and delivered to the defendants C. S. Lynch and O. A. Simmons, the deed to the lands hereinbefore described, which deed was properly executed and acknowledged and a copy of which is hereto attached, made a part hereof and marked Exhibit "D."

Plaintiff further states that the defendants herein acquired no title to said land by reason of the execution of said deed to the said Emmer Sisney, but that the appearance of the same on the record in the Recording District at Purcell where the said land is situated, impairs the value of this plaintiff's said land and that the appearance of the same on record is a cloud on this plaintiff's said title.

Plaintiff further states that the land as described herein at the time of the selection and at this time is unenclosed, without any improvements thereon and that no part of the same is in a state
23 of cultivation, and there is no one using or occupying the same, and that by reason of these statements this plaintiff has no adequate remedy at law.

Plaintiff further states that the conveyance, marked Exhibit "B" was filed for record in the recording district where said land is situated Dec. 13, 1906; that the conveyance marked Exhibit "D" was filed for record in the Recording District where said land is situated Dec. 19, 1906, and each of said conveyances were duly recorded in due course. The conveyance marked Exhibit "C" was duly filed in the office of the Recorder of Deeds in the District in which said land is situated on the 22nd day of February, 1907, and duly recorded in due course.

Plaintiff further states that the said Apple and Franklin complied with the terms of their said contract with the said Emmer Sisney and by said services procured the enrollment of the said Emmer Sisney.

The plaintiff further states that at no time has either the said Apple or Franklin been a member of either the Choctaw or Chickasaw Tribes of Indians, or a claimant to the rights of citizenship therein.

Wherefore the premises considered, the plaintiff prays that the defendants be cited as the law directs, that this plaintiff's said title in and to the said lands as hereinbefore described, be quieted, that the deed so executed with the said Emmer Sisney to the defendants herein be cancelled of record and held for naught, and that this plaintiff have all other relief to which he may be entitled.

(Signed) H. A. LEDBETTER,
Attorney for Plaintiff.

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I, Wirt Franklin, state that I am the plaintiff in the above styled action and that the allegations stated therein are true.

(Signed) WIRT FRANKLIN.

Subscribed and sworn to before me this the 8th day of
24 February, 1909.

[SEAL.] (Signed) J. O. MULLEN,
Notary Public.

My commission expires 1. 10. 13.

Endorsed: Amended petition. Filed at Purcell Oct. 22, 1910. J. G. Siler, District Clerk. H. A. Ledbetter, Att'y for Pl'ff.

25 EXHIBIT "A."

Memorandum of Agreement.

These articles of agreement made and entered into on this the 16th day of December, 1905, by and between Emmer Sisney of Boswell, Indian Territory, party of the first part, and S. A. Apple and Wirt Franklin of Ardmore, Indian Territory, party of the second part.

Witnesseth, that the party of the first part is an applicant for enrollment as a citizen by intermarriage of the Choctaw Nation, and hereby employs the services of S. A. Apple and Wirt Franklin as attorneys and counselors in said citizenship case before the Commission to the Five Civilized Tribes and the Department of the Interior; agreeing to pay, and the party of the first part does hereby acknowledge her indebtedness to the parties of the second part in the sum of fifteen hundred dollars, which is due and payable as soon as the party of the first part is finally enrolled as an intermarried — of the Choctaw Nation.

The party of the first part further agrees to execute a good and sufficient warranty deed anew to the entire surplus or alienable portion of her allotment where-ever selected or filed as soon as the selection is made after the final enrollment, which deed is to be delivered to the parties of the second part, in lieu and as a complement to the deed this day executed by the party of the first part to the second part.

Parties of the second part agree to represent party of the first part in said citizenship case, and agree to perform all the acts necessary as such attorney or counsel before the Commissioner to the Five Civilized Tribes and the Department of the Interior, for the sum of Fifteen hundred dollars.

In witness whereof, we, and each of us set our hands and seals at Muskogee, Ind. Ter., on this the 16th day of October, 1905.

EMMER SISNEY. [SEAL.]
APPLE AND FRANKLIN. [SEAL.]

Exhibit "A."

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26 EXHIBIT "B."

Warranty Deed.

Know all men by these presents: That I, Emma Sisney, a citizen by intermarriage of the Choctaw Nation, of Boswell, Indian Territory, for and in consideration of the sum of $1500.00, cash in hand paid by S. A. Apple, of Ardmore, Indian Territory, and Wirt Franklin of Muskogee, Indian Territory, receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto said S. A. Apple and Wirt Franklin, the following described lands: All of my alienable lands, commonly known as surplus lands, being the entire amount of land to which I am entitled in the Choctaw-Chickasaw Nations, as a member of the Choctaw Tribe of Indians by intermarriage, exclusive of homestead.

To have and to hold said lands unto the said S. A. Apple and Wirt Franklin, their heirs and assigns forever. And I hereby covenant to warrant and defend the title in and to said lands against the claims of all persons whomsoever. It is intended by this instrument to convey in fee my entire interest in any and all lands in the Choctaw-Chickasaw Nations which may be finally allotted to me by the Commissioners to the Five Civilized Tribes, exclusive of my homestead, whether the same may be located in the Choctaw or Chickasaw Nation.

And I, —— ——, wife of the said —— —— for and in consideration of the above mentioned, do hereby release and relinquish to the said S. A. Apple and Wirt Franklin, all of my right and interest in and to dower in and to the above described lands.

In witness whereof, I hereunto set my hand — seal on this the 16th day of October, 1905.

(Signed) EMMER SISNEY. [SEAL.]

Exhibit "B."

27 UNITED STATES OF AMERICA,
Indian Testimony, *Western District:*

Be it remembered, that on this day personally appeared before me, the undersigned, acting and duly commissioned Notary Public within and for the Western District of the Indian Territory, Emmer Sisney, well known to me to be the person whose name appears signed to the foregoing deed, and acknowledges to me that she had executed the same for the uses, purposes and consideration therein mentioned and set forth and so I certify.

In Testimony whereof, I hereunto set my hand and affix my seal as such Notary on this the 16th day of October, 1905, at Muskogee, Indian Territory.

[SEAL.] (Signed) M. G. BAILEY,
Notary Public.

My commission expires Oct. 12th 1907.

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28 *Certificate of Allotment.*

INDIAN TERRITORY,
Southern District:

I, S. A. Apple, an attorney at law, of Ardmore, Indian Territory, certify on my oath that Emmer Sisney, a citizen by intermarriage of the Choctaw Nation, did on the 12th day of December, 1906, select, file upon and formally take in allotment at the Chickasaw Land Office of the commissioner to the Five Civilized Tribes, as her allotment, exclusive of homestead, the following described lands in the Chickasaw Nation, Indian Territory, to-wit:

N. E./4 of S. E./4 Sec. 6 and S./2 S. E./4 S. W./4 Sec. 10 N. E./4 of N. E./4 of N. W./4 Sec. 15, Twp. 8 N. Rng. 3 W.; E./2 of N. E./4 of S. E./4 Sec. 12, and S. W./4 of N. E./4 of S. E./4 Sec. 12, Twp. 8 N. Rng. 4 W.; and the N. E./4 of the N. W./4 of N. W./4; the S. W./4 N. W./4 N. W./4 and N. E./4 of N. W./4 of S. W./4 Sec. 34, Twp. 9 N. Rng. 4 W., and the N. W./4 N. W./4 of N. W./4 Sec. 34, Twp. 9 N., Rng. 4 W.

as I verily believe and am informed.

(Signed) S. A. APPLE.

Subscribed and sworn to before me on this the 13th day of December 1906.

[SEAL.] (Signed) C. M. CAMPBELL, *Clerk,*
By T. F. GREEN,
Deputy Clerk.

29 [Endorsed:] Warranty Deed. Emmer Sisney to S. A. Apple and Wirt Franklin. Filed at Purcell for record December 13, 1906, 8 A. M. T. F. Green, Deputy Clerk.

30 EXHIBIT "C."

Quit Claim Deed.

INDIAN TERRITORY,
Southern District:

Know all men by these presents: That I, S. A. Apple and Byron W. Apple, his wife, of Ardmore, Indian Territory, for and in consideration of the sum of Five Dollars to me in hand paid by Wirt Franklin of Ardmore, Indian Territory, the receipt whereof, is hereby acknowledged, have this day forever remised, released and quit claimed, and by these presents do remise, release, quit claim and convey unto the said Wirt Franklin of Ardmore, Indian Territory, the following described property, to-wit:

North-east quarter of the Southeast quarter of the South-east quarter, Section six (6); South half of the South-east quarter of the South-west quarter, Section Ten (10); and North-east quarter of the North-east quarter of the Northwest quarter, Section Fifteen

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(15) Township 8 North, Range 3 West; and the East half of the Northeast quarter of the South-east quarter and the South-west quarter of the North-east quarter of the South-east quarter, Section twelve (12), Township 8 North, Range 4 West; and the North half of the Northwest quarter of the Northwest quarter; the Southwest quarter of the Northwest quarter; and the Northeast quarter of the Northwest quarter of the Southwest quarter, Section Thirty-four (34). Township 9 North, Range 4 West, containing 110 acres, more or less.

To have and to hold unto the said Wirt Franklin, his heirs and legal representatives forever, together with all and singular the rights and *incidents,* privileges and appurtenances thereunto belonging or in any wise appertaining.

And we do and our heirs and legal representatives shall forever warrant and defend the title to all of the said property unto the said Wirt Franklin, his heirs and legal representatives forever only against the claim or claims of any and all persons lawfully claiming or to claim the same or part thereof, by, through, or under S. A. Apple aforesaid.

And I, Byron W. Apple, wife of the said S. A. Apple, for the consideration herein expressed do hereby release and relinquish unto the said Wirt Franklin, all my right or dower in and to said land.

31 Witness our hands this 19th day of January, 1907.

(Signed) S. A. APPLE. [SEAL.]
BYRON W. APPLE. [SEAL.]

INDIAN TERRITORY,
Southern District, ss:

Be it remembered, that on this day personally appeared before me, the undersigned, a Notary Public, duly commissioned and acting within and for the Southern District of the Indian Territory, S. A. Apple, to me personally well known as one of the parties grantor in the within and foregoing deed of conveyance, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

And I further certify that on this day also voluntarily appeared before me, the said Byron W. Apple, wife of said S. A. Apple, to me personally known to be the person whose name appears upon the within and foregoing, and in the absence of her said husband, declared that she had of her own free will executed said deed and signed and sealed the relinquishment of dower and homestead therein expressed for the consideration and purposes therein contained and set forth, without compulsion or undue influence of her said husband.

Witness my hand and seal as such Notary Public on this nineteenth day of January, 1907.

[SEAL.] (Signed) T. C. BRIDGEMAN,
Notary Public.

My commission expires Jan. 19th, 1908.

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32 [Endorsed:] Quit Claim Deed. S. A. Apple and wife to Wirt Franklin. Filed at Purcell for record, January 22nd, 1907, 8 a. m. T. F. Green, Deputy Clerk.

33 EXHIBIT "D."

Warranty Deed.

This Warranty Deed made this 14th day of December, 1906 by and between Emmer Sisney, a single woman of Boswell, Indian Territory, party of the first part, and C. S. Lynch, and O. A. Simmons parties of the second part:

Witnesseth: that for and in consideration of the sum of Fifteen Hundred and no/100 Dollars, cash in hand, paid by the said parties of the second part to the said party of the first part, the receipt of which is hereby acknowledged, do hereby give grant, bargain, sell and convey unto the said parties of the second part, their heirs and assigns, all of a certain tract of real estate situated in Chickasaw Nation of the Indian Territory, bounded and described as follows: South half of the Southeast quarter of the Southwest quarter of Section Ten (10) and the Northeast quarter of the Northeast quarter of the Northwest quarter of Section Fifteen (15), all in Township Eight (8) North, Range Three (3) West and the Northeast quarter of the Southeast quarter of the Southeast quarter of Section six (6) in said township (8) North, Range three (3) West; also the South half of the Northeast quarter of the Southeast quarter and the Northeast quarter of the Northeast quarter of the Southeast quarter of Section twelve (12), Township Eight (8) North, Range Four (4) West; also the North half of the Northwest quarter of the Northwest quarter and the Southwest quarter of the Northwest quarter of the Northwest quarter and the Northeast quarter of the Northwest quarter of the Southwest quarter of Section Thirty four (34) Township nine (9) North, Range four (4) West, according to the official survey and plat thereof, together with all the privileges and rights, improvements and appurtenances thereunto belonging in fee simple.

34 To have and to hold the same unto the said parties of the second part, their heirs and assigns in fee simple forever. And the said party of the first part for herself and her heirs, executirs, administrators and assigns does hereby covenant with the said parties of the second part, their heirs and assigns, that at the delivery hereof said first party is lawfully seized and possessed of an absolute and indefeasible estate of inheritance in fee simple in and to said real estate, and that the same is free and clear of all taxes, assessments and incumbrances of any and all kind whatsoever, and that she has a good right to sell and convey the same to the said second parties as aforesaid and that she will, her heirs, executors and administrators shall forever warrant and defend the title thereto unto the said second parties, their heirs and assigns, against the lawful claims and demands of all persons whomsoever.

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In witness whereof, the party of the first part has hereunto set her hand and seal—

EMMER SISNEY. [SEAL.]

UNITED STATES OF AMERICA,
Indian Territory:

Personally appeared before me J. E. McCleary, the undersigned authority, within and for the said District and Territory, Emmer Sisney, who declared herself to be single and unmarried and to me personally well known to be the person whose name appears to the foregoing Warranty Deed as party grantor, and stated and acknowledged to me that she executed the same as her free and voluntary act and deed for the consideration, uses and purposes therein set forth and contained, and I do hereby certify.

Subscribed and acknowledged before me on this the 14th day of December, 1906.

[SEAL.] J. E. McCLEARY,
Notary Public.

My Commission expires 3/3/1910.

Warranty Deed, from Emmer Sisney, to C. S. Lynch and O. A. Simmons, Filed at Purcell for record Dec. 19th, 1906—8 a. m. T. F. Green, Deputy Clerk.

UNITED STATES OF AMERICA,
Indian Territory, Southern District, ss:

I, C. M. Campbell, Clerk of the United States Court within and for the Southern District of the Indian Territory, do hereby certify that the within and foregoing is a true, perfect and literal copy of the original Warranty Deed from Emmer Sisney to C. S. Lynch and O. A. Simmons, filed for record Dec. 19, 1906, at 8 a. m. as the same now appears of record in my office at Purcell.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 21st day of December, A. D. 1906.

(Signed) C. M. CAMPBELL, *Clerk,*
[SEAL.] By T. F. GREEN, *Deputy.*

35 That thereafter and on the 24th day of October, 1910, the defendants filed their demurrer to the amended petition, which amended petition is in words and figures as follows, to-wit:

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36 In the District Court in and for the Fourteenth Judicial District, Sitting at Purcell, in the State of Oklahoma.

WIRT FRANKLIN, Plaintiff,
v.
C. S. LYNCH et al., Defendants.

Demurrer to Amended Petition.

The defendants, C. S. Lynch and O. A. Simmons, demur to the amended petition of the plaintiff herein and say that the same is insufficient and states no cause of action as against them, or either of them, for the following, among other reasons, to wit:

(1st.) That said amended petition does not state facts sufficient to constitute a cause of action.

(2nd.) That said amended petition discloses upon the face thereof that the conveyance under which plaintiff claims was made prior to the enrollment of Emmer Sisney and prior to the selection of said land in allotment and at a time when said lands were not alienable and at a time when a tract to convey the same was void as being in violation of the Choctaw-Chickasaw Supplemental Agreement and previous treaties and agreements between the said Nations and the United States and the various laws of the United States.

(3rd.) Because it appears from said petition and the Exhibits thereto attached and made a part thereof, that said pretended conveyance was made prior to the selection of said land in allotment and could amount to nothing more than a sale of an individual interest in tribal lands, the making of which was prohibited by the laws of the United States and the treaties and agreements of said tribes.

37 (4th.) That said complaint further fails to state a cause of action because it appears therefrom that the said Emmer Sisney could not, at the time said pretended conveyance was made, lawfully alienate any interest she might have had in the unallotted lands of the Choctaw-Chickasaw Tribe of Indians.

For all of which reasons, these defendants pray that their demurrer be sustained and that the case be dismissed and that they go hence with their costs.

(Signed) S. T. BLEDSOE,
Attorney for Defendant.

Endorsed: Demurrer to amended petition. Filed at Purcell, Oct. 24, 1910. J. G. Siler, District Clerk.

38 Thereafter and on the 8th day of June, 1911, the demurrer to the amended petition came on to be heard and the Court caused the following order to be made of record on the journal of the Court, which journal entry is in words and figures following, to-wit:

39 In the District Court of McClain County, State of Oklahoma.

WIRT FRANKLIN, Plaintiff,
vs.
C. S. LYNCH et al., Defendants.

Journal Entry.

In this the 8th day of June, 1911, this matter came on to be heard, and thereupon came the plaintiff and the defendants, and the court, after hearing the arguments of counsel upon the demurrer of the defendants to the petition over-rules the said demurrer, and to which order of the court, the defendants then and there excepted and announced in open court that they did not desire to plead further, but elected to stand upon their demurrer; thereupon the plaintiff asked for judgment upon the pleadings; and the Court being fully advised in the premises finds in favor of the plaintiff Wirt Franklin and against the defendants, C. S. Lynch and O. A. Simmons, and the Court further finds that the plaintiff, Wirt Franklin, is the legal owner of the land described in his petition, which is as follows to-wit:

N. E. ¼ of S. E. ¼ of S. E. ¼ of Sec. 6 and S. ½ of S. E. ¼ of S. W. ¼ of Sec. 10 and N. E. ¼ of N. E. ¼ of N. W. ¼ of Sec. 15 Township 8 North, Range 3 West and the E. ½ of N. E. ¼ of S. E. ¼ and S. W. ¼ of N. E. ¼ of S. E. ¼ of Sec. 12, Township 8 North Range 4 West and N. ½ of N. W. ¼ of N. W. ¼ and S. W. ¼ of N. W. ¼ of N. W. ¼ and N. E. ¼ of N. W. ¼ of S. W. ¼ of Sec. 34 Township 9 North, Range 4 West, containing 110 acres, more or less, and that at the time of the institution of this suit, said land was unenclosed, without any improvements thereon, no part of the same in cultivation and no one living thereon, and that the title of the plaintiff, Wirt Franklin, is valid and prefect and superior to any right or interest claimed by
40 the defendants C. S. Lunch and O. A. Simmons, and that the defendants, or either of them have no right, title or interest in and to the said land and premises.

It is therefore ordered, adjudged and decreed by the Court, that the title and possession of said plaintiff in said premises be, and the same is hereby forever settled and qui-ted in the plaintiff Wirt Franklin as against all claims or demands by the said defendants, C. S. Lynch and O. A. Simmons, and those claiming or to claim the same under them, or any of them and that the deed from Emmer Sisney to C. S. Lynch and O. A. Simmons, dated the 14th day of December, 1906, and recorded in the office of the Register of Deeds of McClain County, Oklahoma, December 19th, 1906, be and the same is hereby cancelled, set aside and held for naught, as a cloud on the title of the plaintiff, Wirt Franklin, in and to said described premises.

And it is further ordered, adjudged and decreed by the court, that the said defendants C. S. Lynch and O. A. Simmons and those

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claiming through, by or under them, be and they are hereby perpetually enjoined and forbidden to claim any right, title, interest or estate in or to said premises by virtue of said deed hostile or adverse to the title of the plaintiff, Wirt Franklin, and said defendants aforesaid are enjoined from setting up any claim or interest adverse to that of the plaintiff herein and from disturbing the plaintiff in his peac-able and quiet enjoyment of said described premises.

And it is further ordered that plaintiff have and recover of, and from, the defendants C. S. Lynch and O. A. Simmons, his costs herein expended, for which let execution issue, to all of which the defendants in open court except.

(Signed) R. McMILLAN, *Judge.*

Endorsed: Filed at Purcell, Jun- 8, 1911. W. A. Wilcoxson, District Clerk.

41 That thereafter and on the 8th day of June, 1911, defendants filed a motion for new trial, which said motion is in words and figures following, to-wit:

42 In the District Court of McClain County, State of Oklahoma.

WIRT FRANKLIN, Plaintiff,
vs.
C. S. LYNCH et al., Defendants.

Motion for a New Trial.

The defendants move the Court to grant them a new trial herein, because the Court erred in over-ruling the defendants' demurrer to plaintiff's petition.

II.

Because the court erred in holding said Petition sufficient to entitle plaintiff to judgment as against the defendants.

III.

The Court erred in holding that the rights of the plaintiff are superior to those of the defendant- under the facts set forth in Plaintiff's petition.

IV.

The Court erred in rendering judgment for the plaintiff.

For all of which reasons defendants pray that they be granted a new trial herein.

S. T. BLEDSOE,
Attorney for Defendants.

Filed June 8th, 1911.

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43 That thereafter and to-wit on the 8th day of June, 1911, said motion for new trial came on to be heard, and the Court after hearing argument of counsel, overruled said motion, which order overruling said motion is in words and figures following, to-wit:

44 In the District Court in and for McClain County, State of Oklahoma.

No. 108.

WIRT FRANKLIN, Plaintiff,
vs.
C. S. LYNCH, Defendant.

The motion for new trial in the above entitled cause coming on to be heard, and the court after hearing the argument of counsel and due consideration thereof, finds the law against the allowance of a new trial, and overrules said motion for a new trial, to which action of the court in overruling said motion for a new trial defendant in open court excepts, and exceptions allowed.

Defendant is given ninety days from this date within which to prepare and serve case-made and the plaintiff is hereby allowed ten days thereaftr in which to suggest amendments and the case made may be settled upon five days' notice by either party.

R. McMILLAN, *Judge.*

June 26, 1911.

Filed at Purcell Jun- 26, 1911. W. A. Wilcoxson, District Clerk.

That thereafter and on the 8th day of June, 1911, the
45 Court made the following Order in the above case:

46 In the District Court of McClain County, State of Oklahoma.

WIRT FRANKLIN, Plaintiff,
vs.
C. S. LYNCH et al., Defendants.

Order.

On this the 8th day of June, 1911, this matter came on to be heard, defendants giving notice of their intention to appeal from the judgment herein, asked time in which to prepare and serve case-made.

It is thereupon ordered that the defendants be allowed 90 days, from and after the date hereof, in which to prepare and serve case-made, and that the plaintiff be allowed 10 days to suggest amendments thereto; and that said case-made be settled upon 5 days' notice

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by either party and that said case-made be filed with the Clerk of the Supreme Court on or before the first day of Oct. A. D. 1911.

(Signed) R. McMILLAN, *Judge.*

#108. Order. Filed at Purcell Jun- 8, 1911. W. A. Wilcoxson, District Clerk.

47 WIRT*h* FRANKLIN, Plaintiff,
vs.
C. S. LYNCH et al., Defendants.

To the above named Plaintiff and his Attorney of Record, H. A. Ledbetter:

The above and foregoing case-made is hereby tendered to and served upon you, and each of you, as a true full, complete and correct case-made in the above entitled cause, and as a true and correct statement and complete transcript of all the pleadings, motions, orders, evidence, findings, judgments and proceedings in the above entitled cause in the Court aforesaid.

S. D. BLEDSOE,
Attorney for Defendants.

I hereby accept and acknowledge due, legal and timely service of the above and foregoing case-made on me, this 26th day of July, 1911.

H. A. LEDBETTER,
Attorney for Plaintiff.

48 I, the undersigned Attorney of record for the above named plaintiff, do hereby waive notice to me of the time and place of the presenting of the above and foregoing case-made to the Judge of the District Court, before whom said cause was tried, for settlement and signing and hereby agree that said case-made may be presented to said Judge for settlement by said Jud-e at any time it may suit his convenience to do so,

The 26th day of July 1911.

H. A. LEDBETTER,
Attorney for Plaintiff.

49 In the District Court in and for the *D*ourteenth Judicial District, McClain County, State of Oklahoma.

WIRT FRANKLIN, Plaintiff,
vs.
C. S. LYNCH et al., Defendants.

I, the undersigned Judge of the District Court of the Fourteenth Judicial District in and for McClain County, State of Oklahoma, hereby certify that the above and foregoing case-made was presented to me as a case-made in the action entitled above; that the same had

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been duly served upon counsel for the plaintiff, Writ Franklin and service thereof duly acknowledged and said counsel for plaintiff had signed a written agreement waiving the notice as to time and place of presenting the same and agreeing that the same may be presented to me for settlement and signing at any time that might suit my convenience, and I now settle and sign the same as a true and correct case-made and direct that it be attested and filed by the Clerk of the said Court.

Witness my hand at Norman in said State and District this the 28th day of July, 1911.

R. McMILLAN,
District Judge.

Attest:
W. A. WILCOXSON, [SEAL.]
Dist. Clerk,
By W. A. CRAIN, *Deputy.*

Endorsed: Filed at Purcell Aug. 1 1911—W. A. Wilcoxson, District Clerk. Filed Aug. 4, 1911. W. H. L. Campbell, Clerk.

50 In the Supreme Court of the State of Oklahoma.

C. S. LYNCH et al., Plaintiffs in Error,
vs.
WIRT FRANKLIN, Defendant in Error.

Motion to Advance.

The parties hereto, both plaintiffs in error and defendant in error, respectfully move the court to advance this cause and set it for submission at an early date because the questions involved in the same are public importance and are now pending in numerous courts in the State and have been decided differently by the different trial courts.

2nd. That the question involved is whether or not a conveyance of land made before the same is selected in allotment and in the particular case before the grantor was enrolled as a member of the tribe is valid.

The parties respectfully represent that their briefs are on file in this cause and service thereof duly made and the cause is ready for submission.

They therefore respectfully pray the court to advance the cause and set it for submission at an early date.

COTTINGHAM & BLEDSOE,
Attorneys for Plaintiffs in Error.
H. A. LEBETTTER,
Attorney for Defendant in Error.

Endorsed on the back as follows: No. 2906. C. S. Lynch, et al. Plaintiff in Error v. Wirt Franklin Defendant in Error. Motion to Advance. Filed Aug. 25, 1911. W. H. L. Campbell, Clerk.

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51 And thereafter, to-wit, on the 26th day of September, 1911, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, September Term, 1911, September 26th, 1911, Eighth Judicial Day.

2906.

C. S. LYNCH, Plaintiff in Error,
vs.
WIRT FRANKLIN, Defendant in Error.

And now this cause comes on for hearing by the court upon the motion herein to advance the above cause on the docket of this court, and the court having considered the same, finds that said motion to advance should be allowed, and it is so ordered.

52 And thereafter, to-wit, on the 14th day of November 1911, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, November Term, 1911, November 14th, 1911, First Judicial Day.

2906.

C. S. LYNCH et al., Plaintiffs in Error,
vs.
WIRT FRANKLIN, Defendant in Error.

And now on this day, the above cause is submitted on the record and briefs filed herein.

53 And thereafter, to-wit: on the 12th day of December, 1911, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, November Term, 1911, December 12th 1911, Ninth Judicial Day.

2906.

C. S. LYNCH et al., Plaintiffs in Error,
vs.
WIRT FRANKLIN, Defendant in Error.

And now on this day it is ordered by the court that the above case be transferred to Supreme Court Commission Division, No. 1.

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54 And thereafter, to-wit: on the 11th day of February, 1913, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, December Term, 1912, February 11th, 1913. Twenty-first Judicial Day.

2906.

C. S. LYNCH et al., Plaintiffs in Error,
vs.
WIRT FRANKLIN, Defendant in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the lower court in the above cause should be reversed and the cause remanded with instructions to sustain the demurrer, and for further proceedings in conformity with the views expressed.

Opinion by Robertson, C.

By the COURT: It is so ordered, the above opinion is hereby adopted in whole, and judgment is entered accordingly.

55 In the Supreme Court of the State of Oklahoma, Supreme Court Commission Division No. One.

Filed Feb. 11, 1913. Withdrawn, Corrected, and Refiled Feb. 18, 1913.

No. 2906.

C. S. LYNCH et al., Plaintiffs in Error,
vs.
WIRT FRANKLIN, Defendant in Error.

Syllabus.

1. On October 16th, 1905, Emmer Sisney made and entered into a contract with A. & F., a firm of lawyers, whereby she agreed to pay them the sum of $1500.00 for their services in prosecuting her claim for enrollment, by intermarriage, in the Choctaw Tribe of Indians; she also on the same date made them a warranty deed to—"all of my alienable land, commonly known as surplus lands, being the entire amount of land to which I am entitled in the Choctaw and Chickasaw Nations, as a member of the Choctaw Tribe of Indians, by intermarriage, exclusive of homestead." She also at the same time contracted to make them a subsequent deed, in lieu of and as a complement to said deed, as soon as she was enrolled, no matter when, or where, said land should be allotted; at the time she was not a member of said Tribe; her claims to citizenship having been repudiated;

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she was not in possession of any land; nor had she selected any as an allotment; on November 26th, 1906, she was enrolled as a citizen of said Nation by intermarriage, and on December 12th, she was allotted certain lands which on December 14th, she conveyed by warranty deed to plaintiffs in error. F., having purchased A's interest in the contract, and the land conveyed by the first deed, brings suit to quiet title against Sisney's last grantees. Held

2. (*a*) She not having been enrolled as a member of the Tribe, and not being in possession of any land, and not having selected any allotment, the contract and deed of October 16th, 1905, were void, and operated to pass no title whatever to the grantees therein named.

(*b*) The Act of Congress of April 21st, 1904, removing restrictions of allottees in the Five Civilized Tribes, did not apply to the grantor named in said deed for that she was not an allottee, nor had the land, at that time, been allotted.

(*c*) Said contract and deed being prohibited by the laws of the Tribe, the Treaties and the Laws of the United States, were
56 therefore insufficient to pass the subsequently acquired title to said property.

(*d*) The "doctrine of relation" as found in Section 642 Mansf. Dig. of Arkansas, can not be invoked in this case, for it was not only necessary to pass title to subsequently acquired property that the contract, at the time of its execution must be valid, but also the property sought to be conveyed must be alienable, and the grantor must have the right to execute the same, none of which conditions existed in this case.

3. An "allottee," as the word is used in the Act of April 21st, 1904, (33 Stat. L. 189-204) is one, generally an Indian, Freedman, or adopted citizen of a Tribe of Indians, to whom a tract of land, out of a common holding, has been given by, or under the supervision of the United States, while an "allottment" is the tract of land thus set aside for and awarded to an allottee.

Error from the District Court of McClain County. R. McMillan, Judge.

Action by Wirt Franklin against C. S. Lynch and O. A. Simmons, to cancel a deed and quiet title. Judgment for plaintiff. Defendants bring error.

Reversed and rendered.

This controversy involves the title to One Hundred Ten acres of land located in Section Thirty-four (34), Township Nine (9) North, Range Four (4) West, in McClain County, Oklahoma.

The facts as stated in the petition are as follows: On October 16th, 1905, Emmer Sisney was asserting her right to membership in the Choctaw Tribe of Indians by intermarriage; this right was denied by the Choctaw Nation, and her citizenship claim was repudiated. She was not in possession of any lands in either the Choctaw or Chickasaw Nations; on the date above named, she entered into a contract with Apple & Franklin, a firm of lawyers, by which she em-

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ployed them to represent her in her application for enrollment as a citizen of the Choctaw Nation, and agreed to pay them
57 $1500.00 for their services, and as a part of the contract of said employment she agreed to execute a good and sufficient warranty deed to her entire surplus, or alienable portion of her allotment, in case she was allotted, wherever selected, or filed upon, and as soon as the selection was made after final enrollment; she also at the same time executed an instrument purporting to be a warranty deed to S. A. Apple and Wirt Franklin to lands described as follows: "All of my alienable land, commonly known as surplus lands, being the entire amount of land to which I am entitled in the Choctaw and Chickasaw Nations, as a member of the Choctaw Tribe of Indians by intermarriage, exclusive of homestead." She also promised at the same time to make and deliver a good and sufficient warranty deed to the said Apple and Franklin in lieu of and as a complement to this deed: thereafter Apple and his wife, by warranty deed, conveyed whatever interest they may have had in said land to Wirt Franklin, and the contract of employment and this purported deed constitutes the title of the plaintiff in error. This deed from Sisney to Apple & Franklin was filed for record December 13th, 1906.

Emmer Sisney was enrolled as a member of the Choctaw Tribe of Indians by intermarriage, and such enrollment approved by the Secretary of Interior on November 26th, 1906, and the land in controversy allotted to her on December 12th, 1906, and certificate and patent were thereafter issued to her. On December 14th, 1906, she conveyed said lands to C. S. Lynch and O. A. Simmons, the plaintiffs in error, by warranty deed, for a consideration of $1500.00, which deed was recorded on December 19th, 1906. The orig-
58 inal contract of employment, the various deeds, hereinabove mentioned, together with an affidavit by S. A. Apple, that Emmer Sisney selected the lands in controversy as her surplus allotment, on December 12th, 1906, are all attached to and made a part of the petition. Defendants filed a general and special demurrer to the petition on the grounds of, First: said petition does not state facts sufficient to constitute a cause of action. Second, said petition discloses upon the face thereof that the conveyance under which plaintiff claims, was made prior to the enrollment of Emmer Sisney and prior to the selection of said land in allotment and at a time when said lands were not alienable, and at a time when the contract to convey the same was void, as being a violation of the Choctaw-Chickasaw Supplemental Agreement, and previous treaties and agreements between the said Nations, and the United States, and the various laws of the United States, and, Third: because it appears from said petition and the exhibits thereto attached and made a part thereof, that said pretended conveyance was made prior to the selection of said land in allotment, and could amount to nothing more than a selling of an individual interest in tribal lands, the making of which was prohibited by the laws of the United States and the treaties and agreements of said Tribes. The demurrer was overruled and the defendants elected to stand upon the same. Judgment was rendered in favor of the plaintiff, and cancelling the deed to the de-

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fendants, as a cloud upon the title of the plaintiff Franklin. Exception was duly taken to the ruling and judgment of the court, and time allowed in which to prepare and serve a case-made.

59 Cottingham & Bledsoe, for Plaintiffs in Error.
Hugh A. Ledbetter, for Defendant in Error.

ROBERTSON, C. (After stating facts as above):

Plaintiffs in error rely upon the following assignment of error, viz:

"The lands in controversy not being in possession of Emmer Sisney, and she not having been enrolled as a member of the tribe, and not having selected the lands in allotment at the time of the execution of the contract of employment, and purported conveyance, on October 16th, 1905, the same is void, and operated to pass no title whatever to the grantees therein, and judgment therefore should have been for defendants below."

If this contention is correct, the judgment of the trial court is wrong, and must be reversed. Defendant in error insists, however, that this conveyance, made on October 16th, 1905, was valid and cites the Act of Congress of April 21st, 1904, which among other things, provides:

"And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians, who are not of Indian Blood, except minors, are, except as to homesteads, hereby removed. * * *."

and that this conveyance was made under and by virtue of Chapt. 27 Mansf. Dig. Ark., which was put in force in the Indian Territory, February 19th, 1903, 10 Fed. Stat. Ann. 30. Plaintiffs in error, however, contend that this provision is not applicable to the case at bar, for that such statute had reference only to "allottees," and that Emmer Sisney was not an "allottee" at that time, and that, therefore, such provision does not apply to her, and also that said statute applied only to lands that had in fact been "allotted," neither of which conditions existed in this case at that time.

60 An "allottee," as the word is used in the statute above quoted, is one, generally an Indian, Freedman, or adopted citizen of a Tribe of Indians, to whom a tract of land, out of a common holding, has been given by, or under the supervision of the United States, while an "allotment," is the tract of land thus set aside for, and awarded to, an alottee.

It is, and has been, during all the time allotments of land in severalty to Indians have been made, the policy of the government to place the individual Indian or allottee in possession of an allotment free of deeds, liens or other incumbrances, and all attempts at alienation, before restrictions have been removed and especially before allotment, have been frowned upon and uniformly denied by the government.

In this case, no allotment had been selected by Emmer Sisney, at the time the contract and deed were executed, nor was she an

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alotteé; she was, in fact, not even a member of the Tribe, and therefore she had no legal or equitable estate in and to any of the land in said Nations, which she could then convey. Coat vs. United States, 224 U. S. 458; Mullen vs. United States, 224 U. S. 448. McLaughlin vs. Ardmore Loan & Trust Co., 21 Okla. 173; Smith & Steele vs. Martin, 28 Okla. 836; Howard vs. Farrar, 28 Okla. 480; Combs et al. vs. Miller, 24 Okla. 576; Gritts vs. Fisher, 224 U. S. 640; Stephens vs. Cherokee Nation, 174 U. S. 445.

Section 11 of the Choctaw-Chickasaw Agreement (32 Stat. L. 641) reads as follows:

"There shall be allotted to each member of the Choctaw and Chickasaw tribes as soon as practicable after the approval by the Secretary of the Interior of his enrollment provided herein,
61 land equal in value to three hundred and twenty acres of the average allottable land of the Choctaw and Chickasaw nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval by the Secretary of the Interior of his enrollment, land equal in value to forty acres of the average allotable land of the Choctaw and Chickasaw nations; to conform, as nearly as may be, to the areas and boundaries established by the Government survey, which land may be selected by each allotteé so as to include his improvements."

It was held by the court in McLaughlin v. Ardmore Loan & Trust Co., 21 Okla. 173; 95 Pac. 779, that Section 2118 Revised Statutes of the United States, which provides a penalty for "every person who makes settlement on any lands belonging, secured or granted by treaty with the United States to any Indian Tribe, etc., etc.," applied and that a sale of such land by a member of the Choctaw Tribe of Indians, holding possession of the same in excess of that permitted by Section 16, c. 1366, Act. Cong. July 1st, 1902 (32 Stat. L. 643) to a person not a member of the tribe, was absolutely void. See also Combs et al. v. Miller, supra; Howard et al. v. Farrar, 28 Okla. 490; 114 Pac. 695.

The Choctaw-Chickasaw Treaty of July 1st, 1902 (32 Stat. L. 641) provides:

"15. Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided.

"16. All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent, etc."

"19. It shall be unlawful after ninety days after the date of the final ratification of this agreement for any member of the Choctaw or Chickasaw tribes to enclose or hold possession in any manner, by himself or through another, directly or indirectly, more lands in value than that of three hundred and twenty acres of average
62 allottable lands of the Choctaw and Chickasaw Nations, as provided by the terms of this agreement, either for himself

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or for his wife, or for each of his minor children, if members of said tribes; and any member of said tribes found in such possession of lands, or having the same in any manner enclosed after the expiration of ninety days after the date of the final ratification of this agreement, shall be deemed guilty of a misdemeanor."

In Bledsoe v. Wortman et al., — Okla. —, decided at the December 1912 term of this court, not yet officially reported, Mr. Justice Williams, speaking for the court says:

"Said sections fourteen and fifteen were construed by this court in Allen v. Oliver, 31 Okla. 356, 121 Pac. 226, wherein it was held that;

'Under sections 14 and 15 of the Cherokee Agreement, approved July 1, 1902 (Act July 1, 1902, c. 1375, 32 S. 717) all lands allotted to members of the said tribe, except homesteads, were alienable in five years after issuance of patent, and not prior thereto.'"

This holding by this court was approved by the Eighth Circuit Court of Appeals in Trusket et al. v. Closser, 198 Fed. 835.

Not only were non-citizens and corporations prohibited by said section 2118 of the Revised Statutes of the United States from making a settlement on any lands belonging to the Cherokee Tribe, or from surveying or attempting to survey such lands or designating any of the boundaries by marking trees or otherwise, independent of the performance of official duties under direction of the United States Government or tribal government, but also after the passage of the Act of July 1st, 1902 (32 Stats. at L., c. 1375, p. 716), and the expiration of ninety days from said date, it was not permissible for any member of the Cherokee Tribe to enclose or hold possession of, in any manner, by himself, or through another, directly or indirectly, more lands in value than that of one hundred and ten acres of average allottable lands of the Cherokee Nation, either for himself or his wife, or for each of his minor children, if members of said tribe; and any member of said tribe found in such possession of lands, or having the same in any manner enclosed, after the expiration of ninety days after the date of ratification of said act, he was to be deemed guilty of a misdemeanor.

Obviously Jess Fulsom, a Cherokee citizen, to which the land in controversy was allotted, had no authority to alienate said land, except by virtue of said Act of April 21, 1904, removing
63 the restrictions upon the alienation of the lands of all allottees of either of the Five Civilized Tribes, who are not of Indian blood, except minors and except as to homesteads.

The limitation or prohibition under said section fourteen is that lands allotted to citizens shall not be alienated by the alottee or his heirs, and under said section fifteen the grant, which also operated as a limitation or restriction against alienation to such date, is that lands allotted to members of said tribe shall be alienable in five years after issuance of patent. The restriction removal provision of said Act of April 21, 1904 (33 U. S. Stat. at L. 189) harmonizes with said sections fourteen and fifteen, as restrictions upon the alienation of the lands of allottees and of the Five Civilized Tribes, who

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are not of Indian blood, except minors and as to homesteads, are removed.

Prior to April 21, 1904, the lands of the Cherokee Nation were absolutely inalienable until allotted to members of said Tribe. Said Act of April 21, 1904, sought to take off this restriction as to certain lands of allottees not to remove restrictions upon the distributive share of any members of the Tribe, even prior to allotment. The restriction which had been imposed upon the allottees by said sections fourteen and fifteen was in only part removed. Such parties became allottees only after the land had been allotted to them.

In McKee v. Henry, decided by the United States Circuit Court of Appeals, Eighth Circuit at its September 1912 Term, that court said:

"The Muskogee or Creek Tribe was in the nature of a dependent nation, and, as our national public buildings belong to the nation, the citizen while he has an interest in them, has no share in the title to them, so these lands, so far as the Indian title was concerned belonged to the tribe as a community and no separate Indian had any title whatever, severally, or as a tenant in common. No law or agreement to divide the lands in severalty had any effect to create such title until the lands were actually allotted. All these laws contemplated that the tribe through its members would receive substantially the whole reservation in lands or money. If the right to lands was vested after enrollment and before allotment, then why was the interest of the Indians not actually vested in the remaining lands and money. Yet it was expressively held in Gritts v. Fisher, 224 U. S. 640, that the interest in the remaining lands and money was not vested, and that new participants could be added by Congress.

"The enrolling primarily established the right of citizenship and only incidentally conferred the right to allotment and until allotment was made no inheritable right vested in the individual Indian. * * *"

"In the opinion it is further said:

64 "When the allotment was made for the first time the rights of any individual vested and the title became vested in the one at that time fixed by the law and it makes no difference what previous laws may have provided."

"If no such interest had vested that could be inherited until after the allotment certainly no equitable title to the land in controversy vested until allotment. It was upon the theory that an equitable estate had vested before the issuance of patent that conveyances prior to the issuance of patent were sustained. (Gost et al. v. United States, supra; Godfrey v. Iowa Land & Trust Co., supra McWilliams Inv. Co. v. Livingston et al., supra.)

"This holding confirms our construction of the provision from the Act of April 21, 1904, above set out, if prior to allotment the members of the tribe had no such vested interest as could be inherited obviously Congress did not remove the restrictions against alienation so as to permit such member to alienate his land before it was allotted to him. For in the exercise of its guardianship over the

Indians it was certainly the contemplation of the Federal Government that in the alienation of his land he should receive a consideration therefor commensurate with its reasonable value if by removal of restrictions he were permitted to sell his prospective allotment when "it was a mere float * * * giving him the right to no specific property," such a policy would not be conducive to bring about salutary results in favor of the member of the tribe to the end that he should receive his equal share in the allotment of lands, and the same be alienated under conditions that would reasonably bring him a consideration commensurate to its reasonable value."

These cases answer fully the questions presented by the record here for at the time the original deed was executed, to-wit: October 16th, 1905, Emmer Sisney had not been enrolled as a member of the tribe of Indians, and was not in possession of, nor had she selected any land as her allotment, and for the further reason that said lands, the description of which was afterwards ascertained, had not, at that time, been allotted, but were owned by the Tribes as common property, and the still further reason that the
65 attempted conveyance was void because prohibited not only by the laws of the Choctaw and Chickasaw Nations, but also by the treaties made by the United States with said Nations, as well as the laws of the United States then in force. These facts being true, and they are not denied, it follows that the attempted conveyance of October 16th, 1905, was void and the purported conveyance to Apple & Franklin can not be validated, ratified, or given any force or virtue by reason of "the doctrine of relation" as provided for by Chapt. 27 Mansf. Dig. Ark., Supra, for that before such doctrine can be made to operate it must appear that the original contract was valid or of such validity as to have conveyed the title at the time it was made, neither of which conditions, as has been seen, existed.

We have carefully read the case of Sup. Oil & Gas Co. v. Mahlin, 25 Okla. 809, also the case of Gann v. Ball, 26 Okla. 26, cited by counsel for defendants in error in support of his contentions, but find that in the first the allotment was selected as provided in the Cherokee allotment agreement, more than one year prior to the making of the contract sued on, and in the Gann-Ball case the validity of the contract was asserted and urged by both parties, and was not questioned in any way before the court, and that neither case therefore, is of any value to us in the matter under consideration.

In view of the foregoing, it is apparent that the court erred in overruling the demurrer interposed in the court below. Therefore, the judgment of the District Court of McClain County should be reversed, and the cause dismissed.

Feb. 11 1913 By the Court: Adopted in whole.

66 And thereafter, to-wit: on the 18th day of February, 1913, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, December Term, 1912, February 18th, 1913, Twenty-second Judicial Day.

2906.

C. S. LYNCH et al., Plaintiff in Error,
vs.
WIRT FRANKLIN, Defendant in Error.

And now on this day it is ordered by the court that the opinion of the court heretofore filed in this cause, be, and the same is hereby withdrawn for correction, the same is corrected and as so corrected is hereby refiled, and the previous judgment reversing and remanding the cause for further proceedings is hereby set aside and the judgment of the trial court is hereby reversed and the cause dismissed.

67 In the Supreme Court of the State of Oklahoma.

I, W. H. L. Campbell, Clerk of the Supreme Court of the *Supreme Court of the* State of Oklahoma, do hereby certify that the foregoing 66 pages, numbered from one to 66, both inclusive, are a full, true and complete transcript of the record and all proceedings had in said Supreme Court in cause No. 2906, C. S. Lynch et al., Plaintiffs in error, versus Wirt Franklin, Defendant in error, as the same remains on file and of record in my office.

In witness whereof, I hereto set my hand and affix the seal of said Supreme Court, at Oklahoma City, this 2nd day of May, 1913.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of Oklahoma.
By JESSIE PARDOE, *Deputy.*

Endorsed on cover: File No. 23,692. Oklahoma Supreme Court. Term No. 553. Wirt Franklin, plaintiff in error, vs. C. S. Lynch and O. A. Simmons. Filed May 15th, 1913. File No. 23,692.

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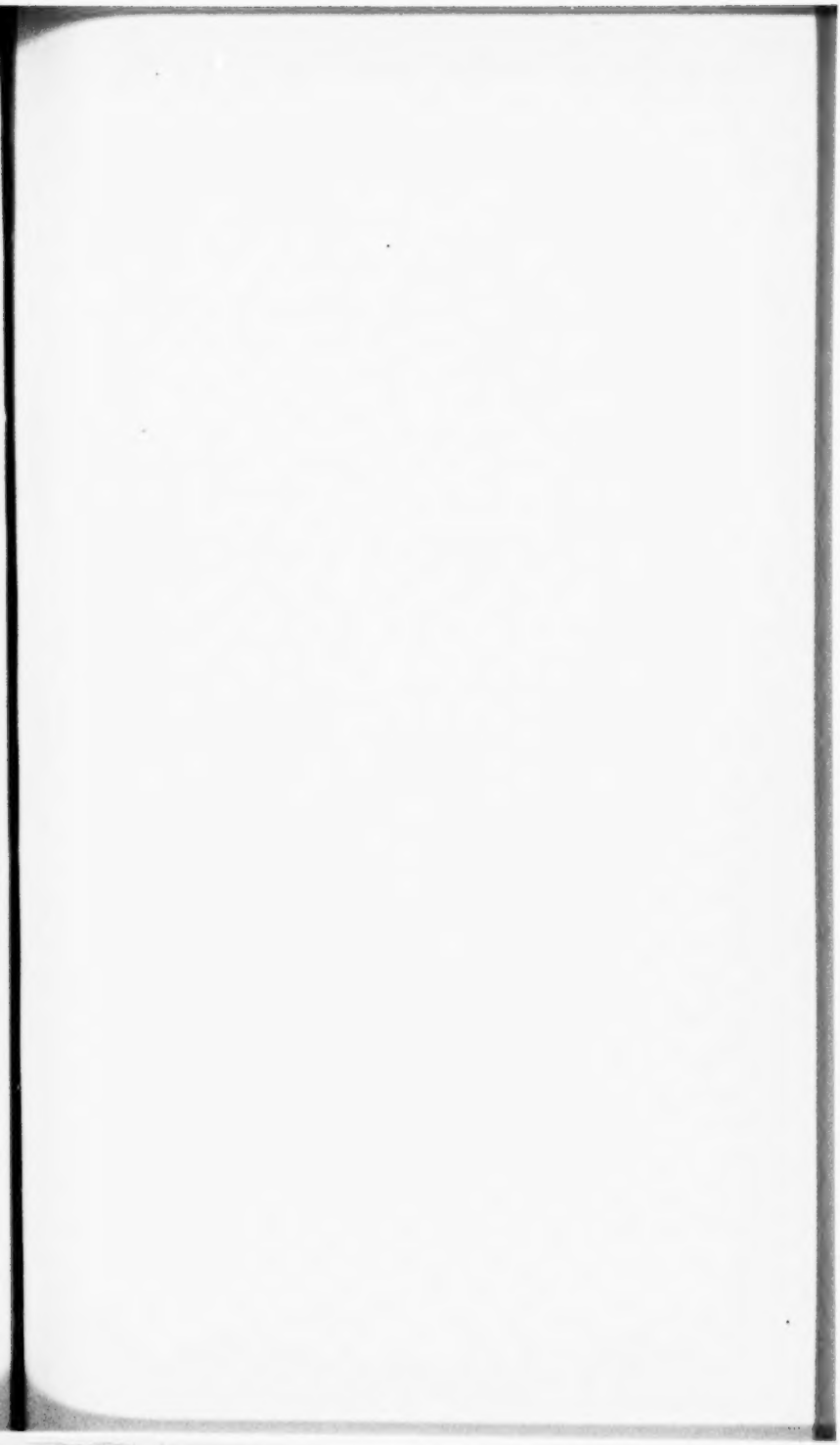

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No. 553.

IN THE

Supreme Court of the United States

at Washington, D. C.

WIRT FRANKLIN,

Plaintiff in Error,

vs.

C. S. LYNCH and O. A. SIMMONS,

Defendants in Error.

H. A. LEDBETTER,

Attorney for Appellants.

IN THE

Supreme Court of the United States

at Washington, D. C.

WIRT FRANKLIN,

Plaintiff in Error,

vs.

C. S. LYNCH and O. A. SIMMONS,

Defendants in Error.

STATEMENT.

On the 22d day of October, 1910, plaintiff in error, Wirt Franklin, filed his amended petition in the district court of McClain County, State of Oklahoma, against the defendants in error, C. S. Lynch and O. A. Simmons (R. p. 10), in which it was alleged that on the 16th day of October, 1905, the plaintiff in error and one S. A. Apple were employed as counsel to represent one Emmer Sisney, seeking to establish the right of the said Emmer Sisney to membership in the Choctaw Tribe of Indians, as an intermarriage citizen of such tribe of Indians, and that at the time of said employment, the said Emmer Sisney made, executed and delivered to the said Wirt Franklin and S. A. Apple her warranty deed ("to all the land that she, the said Emmer Sisney would be entitled to take and receive, other than her homestead"); that at the time of making of said warranty deed, the application for enrollment was pending, but that no selection of allotment had been made, and by reason of which a particular description of the land so conveyed could not be given.

It is further alleged in the amended petition, that the said Emmer Sisney was placed upon the final rolls November 26th, 1906, as an intermarriage citizen of the Choctaw Tribe of Indians, and that to-wit, on the 12th day of December, 1906, the said Emmer Sisney filed upon and selected the following described land, to-wit: NE-4 SE-4 SE-4 sec. 6; S-2 SE-4 SW-4 sec. 10; NE-4 NE-4 NW-4 sec. 15; township 8 north, range 3 west, and E-2 NE-4 SE-4 and SW-4 NE-4 of SE-4 of NW-4 NW-4 and SW-4 NW-4 NW-4 and NE-4 NW-4 SW-4 sec. 34, township 9 north, range 4 west, and that allotment certificates and patents were issued thereto.

It is further alleged that S. A. Apple joined by his wife, Byron W. Apple, conveyed all his right, title and interest in and to the said land to Wirt Franklin, plaintiff in error.

It was further alleged that at the time of the making of the contract and warranty deed to the said Wirt Franklin and S. A. Apple, the said Emmer Sisney was a single person, and was such a single person at the time of the filing of the suit.

It is further alleged that on the 14th day of December, 1906, the said Emmer Sisney executed another warranty deed to her surplus allotment to C. S. Lynch and O. A. Simmons.

It is then alleged that at the time of the selection of the land by Emmer Sisney, the same was unenclosed, without any improvements thereon, and that there was no one using the same.

It is then alleged that the deed to plaintiff in error was filed of record in the proper recording district prior to the time the deed to the defendants in error, and that the deed on record of the defendants in error constitutes a cloud on the title of the plaintiff in error and by reason of which, judgment is asked for the cancellation of the same, and that the title of the plaintiff in error be quieted.

The contract of employment is marked exhibit "A," made a part of the petition (R. p. 13), as is also the warranty deed made a part of the petition, and marked exhibit "B" (R. p. 14), as is "certificate of allotment" made a part of the petition (R. p. 15.) The quitclaim deed from S. A. Apple and wife to Wirt Franklin, is likewise attached to the petition, as is also the warranty deed subsequently executed by Emma Sisney to the said C. S. Lynch and O. A. Simmons.

To this amended petition, the defendants in error filed their demurrer (R. p. 19), the legal question raised by the demurrer being that the conveyance made by Emmer Sisney, prior to selection of the land, to S. A. Apple and Wirt Franklin, was void, being in violation of the Chickasaw-Choctaw Supplemental Agreement (32 Stat. L. 641), and previous treaties and agreements between the said nations and the United States and the various laws of the United States.

This demurrer was overruled by the trial court, and the defendants in error, declining to plead further, judgment was entered for the plaintiff in error, Wirt Franklin (R. p. 20).

The case was appealed to the supreme court of the State of Oklahoma, and on the 18th day of February, 1913, the judgment of the trial court of McClain County, Oklahoma, was reversed and the cause dismissed (R. p. 26-34).

The plaintiff in error, Wirt Franklin, filed his petition for writ of error (R. p. 2), attaching thereto his assignments of error (R. p. 4), and the writ duly allowed and issued (R. pp. 5-6), and after issuance of citation, service was acknowledged (R. p. 1), and the cause was regularly filed and docket-

ed in this court, and is numbered 553 of the October term, 1913.

In our assignment of errors (R. p. 2), we believe the matter can be better presented, by consolidating all the assignments in one general question, and that is: "Whether or not the contract and conveyance of Emmer Sisney, dated October 16, 1906 (R. pp. 13-14) were such conveyances that could be enforced, or were they in violation of the treaties between the Chickasaws and Choctaws on the one side and the United States on the other, or some other law of the United States," and on this theory we will present the case.

The record discloses that Emmer Sisney, a single person and a white citizen of the United States, made application during the year 1899 to be enrolled as an inter-married citizen of the Choctaw Tribe of Indians, and not being finally enrolled up to October 16th, 1906, she saw fit to employ plaintiff in error to represent her in securing her enrollment, and for such services rendered, she executed the deed as shown on page 14 of the record, conveying (as recited in the deed):

> "All of my alienable lands, commonly known as surplus lands, being the entire amount of land to which I am entitled in the Chickasaw-Choctaw Nations, as a member of the Choctaw Tribe of Indians, by intermarriage, exclusive of my homestead.
>
> "To have and to hold said lands unto the said S. A. Apple and Wirt Franklin, their heirs and assigns forever. And I hereby covenant to warrant and defend the title in and to said lands against the claims of all persons whomsoever. It is intended by this instrument to convey in fee my entire interest in any and all lands in the Chickasaw-Choctaw Nations which may be finally allotted to me by the Commissioner to

the Five Civilized Tribes, exclusive of my homestead, whether the same be in the Choctaw or Chickasaw Nation."

By an act of Congress of February 19, 1903 (32 Stat. L. 841), Chapter 27 of Mansfield Digest of the Statutes of Arkansas was extended over the Indian Territory, section 642 of which reads as follows:

"If any person shall convey any real estate by deed, purporting to convey same in fee simple absolute, or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterwards acquire the same, the legal or equitable estate afterwards acquired shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal or equitable estate had been in the grantor at the time of the conveyance."

By the act of Congress of April 21, 1904 (33 Stat. L. 189), section....., in part, is as follows:

"And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to the homesteads, hereby removed, and etc."

These two acts of congress being in existence at the time of making the deed of conveyance, dated October 16, 1905, we feel that they should be read into the treaties between the Chickasaws and Choctaws and the United States and such other laws of the United States then existing.

Under what is commonly called the "Atoka Agreement" act of Congress June 28, 1898 (30 Stat. L. 498), section 11 thereof, we find the following restriction against the right of alienation:

> "Provided further, that the lands allotted shall be non-transferable until after full title is acquired, and shall be liable for no obligations contracted prior thereto by the allottee, and shall be non-taxable while so held."

Under what is commonly called the "Supplemental Agreement between the Chickasaws and Choctaws," ratified by Congress September 25, 1902 (32 Stat. L. 641, Sec 15), we find the following restriction upon the right of alienation:

> "Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt or obligation of any character contracted prior to the time at which said land be alienated under this act, nor shall said lands be sold except as herein provided."

Section 16 of said act is as follows:

> "All lands allotted to the members of said tribes, except such land as is set aside to each as a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years, in each case from date of patent: provided that such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Chickasaw and Choctaw tribal governments for less than its appraised value."

So, we say, that in order to interpret the meaning of the

treaties and the acts of congress, we must necessarily read them together, and we must also take into consideration the history of the times, the previous conditions, as well as what congress was looking forward to, as well as the object of the legislation.

Under the "Atoka Agreement" and the "Supplemental Agreement" *supra*, all members of the tribes, full bloods, mixed bloods, and intermarried citizens were restricted alike, but congress, realizing that the intermarried citizen was capable of handling his own affairs, saw fit to remove the restriction theretofore existing. The restrictions contained in the treaties *supra* were personal, and we maintain that by reading the act of congress of April 21, 1904, *supra*, into the treaties of 1898 and 1902, *supra*, we have a white citizen of the United States conveying land to which he has no title, but afterwards acquires the same, and by section 642 of Mansfield Digest of the statutes of Arkansas, this afterward acquired title, inured to the benefit of the grantee.

By he act of congress of May 2, 1890 (26 Stat. L. 81), the United States courts in the Indian Territory were given express authority to enforce contracts made with Indians, as in said statute, it is provided:

> "And in all cases on contracts entered into by citizens of any tribe or nations with citizens of the United States in good faith and for a valuable consideration, and in accordance with the laws of the tribe or nation, and such contract shall be deemed valid and enforced by such courts."

Now, were it not for the restrictions contained in the treaties of 1898 and 1902, we maintain that the conveyances of the plaintiff in error could be enforced, and when chapter 27, section 642 of Mansfield Digest, and the act of congress

of April 21, 1904, were extended over the Indian Territory, the status of Emmer Sisney was the same as any other citizen of the United States, and when she executed the warranty deed to the plaintiff in error, although she did not have title to the land conveyed, the subsequent title acquired by the selection, the issuance of allotment certificate and issuance of patent, inured to the benefit of her grantee, the plaintiff in error.

We have failed to find anywhere in the treaties and acts of congress, the restriction insisted upon by opposing counsel. The restriction insisted upon being that the Indian can not sell before selection, and to find such a restriction, we say that it is erroneously read into the treaties and acts of congress.

The case at bar is not one where the United States is interested, and the congress of the United States is seeking further legislation before the right of any individual member of the tribe attaches, for the rule is well established that before the individual rigth attaches, congress may legislate the Indians' right away. The cases holding this being

Ligon vs. Johnson, 164 Fed., 670;
Hayes vs. Barringer, 168 Fed., 221;
Wallace vs. Adams, 143 Fed., 716;
224 U. S., 640 (56 Law Ed. 928).

It is our contention, however, that an intermarried citizen of the Choctaw or Chickasaw nation, after the act of congress of April 21, 1904, although he had no vested right in the nation that would prevent congress from legislating with reference to such citizens as it saw fit, still such citizens had a vested equitable right to their just and equal shares against strangers and fellow members of their tribes. Such a right of such a citizen was one in expectancy or enuity that he

may assign, and unless congress legislates this expectancy or equity away before selection is made, we can see no good and valid reason why the after acquired legal title would not inure to the benefit of the assignee or grantee.

Prior to selection by Emmer Sisney, had congress legislated the right to an allotment to an intermarried citizen away, we would not be insisting on the assignment of the expectancy, but congress has not done so.

We hardly feel that it will be contended by counsel for defendants in error that Emmer Sisney did not have a right to employ counsel as she did. This employment did not affect the other members of the tribe; this employment did not affect the land of the tribe, but did affect that portion of the allotment of Emmer Sisney known as the "surplus" allotment after she had made her selection.

By the act of congress of April 21, 1904, it was realized that the intermarried citizen was capable of handling his own affairs, and by reason of which his restrictions were removed, as to a certain portion of his land. Can it be said, that the act of making the selection operated to remove his restrictions? Congress did not say so. In other words, there was nothing said in this act of congress, that the intermarried citizen could do a certain thing and then his restrictions would be removed. If the restrictions were on before selection, it would be illogical to hold that the restrictions attached instantly upon the selection of the allotment, *and by the same act removed.* In other words, it appears to our mind to be illogical to hold that the act of selecting the allotment operated as attaching the restrictions and also removed them.

In 32 Cyc-1066, it is said:

"As it is against public policy of the government

to permit the acquirement of public lands for speculative purposes, some of the statutes prohibit the making of entries for the benefit of a person other than the entryman, *or the assignment of the right to purchase public lands.*. But, in the absence of any express or implied prohibition in the statute under which he is seeking to acquire the land, an entryman or one whose application to purchase has been approved has an equitable interest in the land, which he may assign or convey to another, although he has not yet paid the government price for the land."

In 4 Cyc-12, it is said:

"An assignment of a future interest, though in the form of a conveyance, operates, in equity, by way of present contract merely, to take effect and attach to the thing assigned as soon as it comes into *esse*, and to be regarded before that time only as an agreement to convey, *and after that time as a conveyance.*"

See also the long list of cases cited in the notes, and see also 75 Am. Dec. 434.

In re John Doe, *ex. dem.*, Curtis Mann et al. vs. William Willis, 64 U. S. 584 (16 Law Ed. 584), the Indian sold his expectancy or equity in land before selection or designation and after his death the heirs contested the validity of the deed, and it was insisted in this case as it is here, that the conveyance was against public policy, but this court said:

"The Indian title is property, and alienable, unless the treaty had prohibited its sale."

The court further said:

"It is manifest that sales of the reserved sections

were contemplated, as the lands were forthwith to be surveyed, sold and inhabited by a white population."

To the same effect are the cases of Crews vs. Burcham 1st. Black 352 and Jones vs. Meehan, 175 U. S. I.

Land bounty certificates entitling the holder to enter lands have been held assignable prior to selection and identification. The right to enter additional lands given to a discharged soldier is assignable and transferable.

Webster vs. Luther, 163 U. S. 331;
Barnes vs. Poirier, 64 Fed. 14.

In Bley vs. Naphtaly 73, Fed. 120 the circuit court of appeals for the ninth circuit of the United States held, that the preferred right to purchase, given by the statute is assignable. Also see McKennon vs. Winn, 33 Pac. 582 (Okla.); Lamb vs. Davenport 18 Wall. 307; Hussey vs. Smith 99 U. S. 20.

Story's Equity on Jurisprudence, Vol. 2, Sec. 1040, in speaking of courts of equity, says:

> "They accordingly give effect to assignments and possibilities of trust, and contingent interests, and expectancies, whether they are in real or personal estates, as to assignments of choses in action. Every such assignment is considered in equity, as in its nature amounting to a declaration of trust and to an agreement to permit the assignee to make use of the name of the assignor, in order to recover the debt, or to reduce the property into possession. Contingent rights and interests are not ordinarily assignable at law; and yet they may sometimes be assigned at law if coupled with some present interest."

In re, Shulthis vs. McDougal, 170 Fed. 529, the circuit court of appeals said, that the allotment among the members

was not a new acquisition but more in the nature of a partition and recognition of the right instead of the grant of a right.

In re, Lamb vs. Davenport, 18 Wallace 307, the equity Davenport set up under his cross-bill arose from transactions antecedent to the execution of the patent certificate of Pounsdale, and antedated the act of congress known as the donation law, and the court again said, that the contract is not to be declared void unless inviolation of some express act of congress. There was an inchoate right existing at the time the contract was made.

In re, Webster vs. Luther, 163 U. S., 339, the court said:

> "If, then, congress did not burden the right to additional lands with the condition that they should be contiguous to those originally allotted, it would seem necessarily to follow that the grant of additional lands was without restriction, and, consequently, there was no purpose to interfere with the disposition by the homesteader of such additional lands, or of his interest in them, in any mode he deems proper or that might be adopted in respect to the property owned by him."

And further,

> "We cannot see that any sound policy could have been subserved by restricting the bounty of congress to those who are able to find additional lands contiguous to those previously entered by them," etc.

In re Barnes vs. Poirier, 64 Fed. 14, page 17, it is said:

> "We are unable to find anything in the acts of congress or in the dictates of an enlightened public policy

that requires the imposition of any such restraint. On the other hand, the general rule of law which discourages all restrains upon alienation, the marked contrast between the purpose and the provisions of the grant of the right to the original homestead, and the purposes and provisions of the grant of the right to the additional land, and the history of the legislation which is codified in the existing homestead law, leave us without doubt that the assignment before entry of the right to this additional land granted by section 2306 of the Revised Statutes contravines no public policy of the nation, violates no statute, and is valid as against the assignor, his heirs and assigns."

The circuit court of appeals for the eighth circuit, in Martin vs. U. S., 168 Fed. 205, Judge Sanborn said, that the *enrollment* of an Indian was a chain in his title. So we conclude that there is something in the right of citizenship, and especially so, until congress has legislated the citizenship away. As hereinbefore stated, the United States has not seen fit to intervene and seek to cut out the right thus conferred to the intermarried citizen, but it is a third pary, an interloper, who says that the deed by Emmer Sisney to the plaintiff in error is void as against public policy.

Can it be said that there was anything immoral in the contract and deed made by Emmer Sisney with the plaintiffs in error? Is there any specific provision of the treaty or any Act of Congress that the contract and deed is in violation of? We think not, and unless it is, the same should be upheld.

In*re*, Southerland vs. Whittington, 46 Ark. 285, it is said:

"Whittington, by virtue of his claim, occupancy and improvement of a lot in Hot Springs, applied

to the commissioners appointed under the act of congress of March 3, 1877, to dispose of the lots there, to purchase it; but afterwards conveyed all his interest in the lot to Mrs. Southerland, who was his tenant upon it, with the agreement that she would apply to purchase, and, if successful, would, for a sum agreed on, reconvey a designated part of it to him; and she bound herself by bond for title to perform the agreement; but after she had purchased and obtained title to the lot she refused to execute it, and he filed his bill in equity for its performance. Held: That parties in possession of government land may make valid contracts concerning the title, formed on the hypothesis of a future acquisition of title, unless restricted by congress, and that the contract was based on a valid consideration, and should be enforced."

We can't see how the contract and deed relied upon by plaintiff in error could be effected by sections 2116 and 2118 of the Revised Statutes of the United States. Where congress legislates for the Indians in general, without mentioning the Five Civilized Tribes, they are excepted from its operation. See as bearing on this point, United States vs. Joseph, 94 U. S. 614.

There being no express inhibition in the treaties against the alienation of the "surplus allotment" of an inter-married citizen prior to selection (reading the Act of Congress of April 21, 1904, in the Treaties), the only reason, if any, why such a person could not sell, would be that there was no express authority given to sell before selection. Such a construction would be a strange one indeed, and one that the courts will never uphold. Counsel for defendants in error rely on such cases as Kelly et al. vs. Harper, 104 S. W. 829; Dutton vs. Capitol Townsite Company, 82 S. W. 853; Hubbard vs. Chish, 82 S. W. 687; Rogers vs. Hill, 3 Ind.

Ter. 562; Case vs. Hall, 46 S. W. 180. All of which are Indian Territory cases, but we wish to call the court's attention to the fact that all these cases were decided under conveyances made by the Indian who was restricted in his perpersonal right, and none of them were cases where the conveyance was subsequent to the Act of Congress of April 21, 1904.

The late case of Otto Monson vs. S. J. Simonson, Adv. Sheet, U. S. Supreme, January 1, 1914, is in line with the cases *supra,* and in which this court held that while restrictions were on an Indian, the subsequent acquired title would not inure to the benefit of a grantee, made before acquiring the title. The restrictions remained until the issuance of the final patent, and the conveyance relied upon for the enforcement of the after-acquired property, having been executed before the issuance of the patent, it was, in the language of the statute, absolutely void. To the same effect is the case of Starr vs. Long Jim, 227 U. S. 612, 624 (57 Law Ed. 670), but neither of the cases is like the one at bar, for here, we have a case, where Congress realizes that the white inter-married citizen is capable of handling his own affairs, and by reason of which his restrictions are removed, and there is nowhere to be found an inhibition against the sale before selection . Certainly, we cannot imply such, for to do so, would be legislating.

The only restrictions we have been able to find are contained in the Supplemental Treaty between the Chickasaws and Choctaws, ratified by Congress September 25, 1902 (32 Stat. L. 641), section 15 of which is as follows:

> "Lands allotted to members and freedman shall not be affected or encumbered by any deed, debt or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said land be sold except as herein pro-

vided," and

Section 16 of said act is as follows:

> "All lands allotted to the members of said tribes, except such land as is set aside to each as a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years, in each case from date of patent: provided that such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Chickasaw and Choctaw tribal governments for less than its appraised value."

There is a restriction against the right of alienation contained in section 16 *supra,* this restriction being that the Indian can only sell within a certain time after patent issues, but we maintain that this restriction is removed by section 19 of Act of Congress of April 26, 1906 (34 Stat. L. 139), wherein, in substance it is said:

> "that conveyances heretofore made by members of the Five Civilized Tribes, subsequent to the removal of restrictions, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed."

Now, reading section....., of the Act of Congress of April 21, 1904, with sections 15 and 16 of the Supplemental Treaty of 1902, and section 19 of the Act of 1906, we can see no escape for the doctrine contended for herein.

In *re* Mullen et al. vs. United States, 224 U. S. 448 (56

Law Ed. 834) this court held that land inherited by full blood heirs under section 22 of the Treaty of 1902, was alienable, although the same was sold prior to the time limit specified in section 16 of said Treaty of 1902, giving as reasons therefor, first, that where the Treaty contained no restrictions against the inherited land, the same was alienable, citing Crews vs. Burcham, Doe vs. Wilson and Jones vs. Meehan, *supra*; and second, if the time limit specified in section 16 was a hindrance to the right of alienation, by section 19 of the Act of April 26, 1906, this restriction was removed.

Following Crews vs. Burcham, Doe vs. Wilson. and Jones vs. Meehan, are the following cases:

Rutherford vs. Green's Heirs, 2 Wheat. 197;
Wray vs. Doe, 10 Sn. & M. 452 (Miss);
Land vs. Keirn, 52 Miss. 341;
Francis vs. Francis, 203 U. S. 233;
McAfee vs. Lynch, 26 Miss. 257;
Bonifer vs. Smith, 166 Fed. 846;
Bean vs. U. S., 162 Fed. 260;
Johnson vs. Collins, 12 Ala. 322;
Atwoods Heirs vs. Beck, 21 Ala. 590.

The honorable supreme court of the State of Oklahoma based its opinion upon the proposition that it was illegal to undertake to sell public domain. We maintain that it is not the policy of the courts to presume that the parties to a contract or a conveyance intended to violate the law. There can be no presumptiin of illegality. It is, upon the other hand, the policy of the courts to uphold contracts. These conveyances made by citizens prior to selection of allotment, where there was no restriction against alienation, should be construed as assignments of their expectancy. There was no intention to sell a part of the public domain, for it was the understanding of the parties, at least by implication, that

deeds should not become operative until the land had been selected.

In the case at bar, both parties claim title from a common source, plaintiff in error's deed having been first executed, acknowledged and recorded, the title subsequent acquired by the defendants in error, was subordinate to that of the plaintiff in error, and by reason of which, we maintain that this cause should be reversed.

Respectfully submitted,

H. A. LEDBETTER,

Attorney for Appellants.

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In the Supreme Court of the United States

NUMBER 553

WIRT FRANKLIN,

Plaintiff in Error,

vs.

C. S. LYNCH et al.,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

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NUMBER 553

In the Supreme Court of the United States

WIRT FRANKLIN,

Plaintiff in Error,

vs.

C. S. LYNCH et al.,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

This case comes to this Court on writ of error to a judgment of the Supreme Court of the State of Oklahoma, reversing the judgment of the District Court of the Fourteenth Judicial District of the State of Oklahoma, which judgment had cancelled a deed executed by Emmer Sisney, a member of the Choctaw Tribe of Indians, to the defendants in error. The plaintiff in error in this Court was the plaintiff in the trial court, and the defendants in error in the Supreme Court of the State of

Oklahoma. The defendants in error here were the defendants in the trial court, and the plaintiffs in error in the Supreme Court of the State of Oklahoma. For the purpose of simplifying the statement of the cause, the plaintiff in error in this Court will be referred to as the plaintiff, and the defendants in error as defendants.

The case was submitted to the trial court upon an amended petition and demurrer thereto, which demurrer was overruled and the defendants electing to stand upon the same, judgment was rendered in favor of the plaintiff upon his petition cancelling the deed made by Emmer Sisney, the allottee, to the defendants.

The controversy involves the title to one hundred ten acres of land, located in Section Thirty-four (34), Township Nine (9) North of Range Four (4) West, of which neither of the parties were in possession at the time of the institution of the suit, but as to which both claim title. The title of each is deraigned through Emmer Sisney, who was enrolled as an intermarried citizen of the Choctaw Nation. The facts in relation to the controversy, as set out in the petition, are as follows:

That on the 16th day of October, 1905, Emmer Sisney was asserting a right to membership in

the Choctaw Tribe of Indians by intermarriage. This right was denied by the Choctaw Nation, and Emmer Sisney's citizenship was not recognized. She was not in the possession of any lands in either of the Choctaw or Chickasaw Nation, holding the same for the purpose of allotment or otherwise. With her asserted citizenship in this status, on the 16th day if October, 1905, she entered into a contract with Apple & Franklin, by which she employed them to represent her in her application for enrollment as a citizen by intermarriage of the Choctaw Nation and agreed to pay them for their services the sum of fifteen hundred dollars ($1500.00). Emmer Sisney further stipulated as a part of said agreement to execute a good and sufficient warranty deed anew to the entire surplus or alienable portion of her allotment, wherever selected or filed, as soon as the selection is made after the final enrollment, which deed is to be delivered to the parties of the second part in lieu and as a compliment to the deed this day executed. See Exhibit "B" to petition (Tr. 14).

On the same day Emmer Sisney executed what purported to be a warranty deed to S. A. Apple and Wirt Franklin to lands described as follows:

> "All of my alienable land, commonly known as surplus lands, being the entire amount of

land to which I am entitled in the Choctaw-Chickasaw Nations, as a member of the Choctaw tribe of Indians by intermarriage, exclusive of homestead."

This contract is marked Exhibit "A" to plaintiff's petition (Tr. 13) and this purported deed (Tr. 14), constitutes whatever title plaintiff had to the land in controversy, except that Apple subsequently conveyed his interest to the plaintiff Franklin.

It is the rights thus acquired that the trial court held to constitute a perfect and indefeasible title to the land in controversy, in the plaintiff.

Exhibit "B," though executed on the 16th day of October, 1905, was not filed for record until the 13th day of December, 1906 (Tr. 12). The enrollment of Emmer Sisney as a member of the Choctaw tribe of Indians by intermarriage was duly approved by the Secretary of the Interior on the 26th day of November, 1906, and the lands in controversy allotted to her as a part of her surplus allotment on the 12th day of December, 1906. Certificate and patent were issued in due course. (Tr. p. 11.)

On the 14th day of December, 1906, after the selection of the lands in controversy in allotment

by Emmer Sisney, she conveyed the same to the defendants, C. S. Lynch and O. A. Simmons, by warranty deed, in consideration of the sum of fifteen hundred dollars ($1500.00) cash in hand paid (Tr. pp. 12-17-18). This deed was duly acknowledged on the date of its execution and recorded on December 19th, 1906, in the office of the Clerk of the United States Court for the Southern District of the Indian Territory, Purcell, the district in which the land was located.

The facts are set out in more detail in the plaintiff's petition. To this petition was attached as Exhibit "A" the contract of October 16th, 1905, between Emmer Sisney and Apple and Franklin (Tr. 13); the purported warranty deed from Emmer Sisney to Apple and Franklin, dated the 16th day of October, 1905, also an affidavit of S. A. Apple that Emmer Sisney selected the lands in controversy as a part of her surplus allotment on the 12th day of December, 1906 (Tr. 10); also a warranty deed from Emmer Sisney to C. S. Lynch and O. A. Simmons, bearing date of December 14th, 1906, was attached as Exhibit "B" (Tr. 17).

To this amended petition the defendants interposed a demurrer upon the following grounds:

FIRST: That said amended petition does not state facts sufficient to constitute a cause of action.

SECOND: That said amended petition discloses upon the face thereof that the conveyance under which plaintiff claims was made prior to the enrollment of Emmer Sisney and prior to the selection of said land in allotment and at a time when said lands were not alienable and at a time when a contract to convey the same was void as being in violation of the Choctaw-Chickasaw supplemental agreement and previous treaties and agreements between the said nation and the United States and the various laws of the United States.

THIRD: Because it appears from said petition and the exhibits thereto attached and made a part thereof, that said pretended conveyance was made prior to the selection of said land in allotment, and could amount to nothing more than a sale of an individual interest in tribal lands, the making of which was prohibited by the laws of the United States and the treaties and agreements of said tribes (Tr. 19).

This demurrer was overruled, and the defendants electing to stand upon the same, judgment was rendered in favor of the plaintiff and cancelling

the deed to the defendants, as a cloud upon the title of plaintiff Franklin (Tr. 20-1).

The judgment of the trial court was reversed by the Supreme Court of the State and the trial court directed to render a judgment in favor of the defendants.

The plaintiff sued out a writ of error from the Supreme Court of the State of Oklahoma to this Court to review and reverse the judgment of the Supreme Court of the State of Oklahoma.

The Supreme Court of the State of Oklahoma held that the lands in controversy, not having been selected in allotment at the time of the conveyance to the plaintiff, that such lands were not alienable; that said conveyance did not operate to pass title thereto, but was void and ineffectual, for any purpose whatever.

There is, therefore, but one vital question involved in the case, and that is the validity of the conveyance under which the plaintiff claims. There is no question as to the validity of the conveyance to defendants. It was made after the land was allotted, and after the Act of April 21st, 1904 (Chapter 1402, 33 Stat. 204), by an intermarried citizen, and therefore after such lands were alien-

able. *Goat* v. *United States,* 224 U. S. 458; *Deming Inv. Co.* v. *United States,* 224 U. S. 471.

If the lands involved were alienable prior to allotment by the conveyance executed by Emmer Sisney on the 16th day of October, 1905, and not only before they were selected in allotment, but before Emmer Sisney was enrolled as a member of the tribe, and before she had in anywise secured possession or control of any lands in the Choctaw or Chickasaw Nations, then the judgment of the Supreme Court of the State of Oklahoma should be reversed; if not, it must be affirmed.

ARGUMENT.

Notwithstanding there are numerous assignments of error to the action of the Supreme Court of the State of Oklahoma, inasmuch as there is but one vital question in the cause and that is the validity of the conveyance under which the plaintiff claims, it is not deemed necessary to discuss these assignments in detail. We will, therefore, proceed at once to a consideration of the controlling question in the case.

The defendants insist that the conveyance from Emmer Sisney under which plaintiff claims is void, because made before the enrollment of Emmer Sisney as a member of the Choctaw tribe of Indians, before she had selected or attempted to select the land involved in allotment and at a time when she was not in possession of said land, and when she had no intention of allotting the same.

Giving to Emmer Sisney the standing of a member of the tribe, which she did not have at the time of the execution of the conveyance to plaintiff, the effect of that conveyance is nothing more than to convey her undivided interest in the tribal lands of the tribe. Such interest was clearly not subject to alienation.

The lands here involved are located in the Chickasaw Nation and were selected in allotment by Emmer Sisney on the 12th day of December, 1906, pursuant to the original Choctaw-Chickasaw Allotment Agreement, which agreement constitutes Section 29 of the Act of June 28th, 1898, Chap. 517, 30 Stat. 495-505, and in accordance with the Choctaw-Chickasaw Supplemental Agreement, Chap. 1362, 32 Stat. 641.

Plaintiff asserts that Emmer Sisney was authorized to alienate her interest in the tribal lands prior to the selection of the same in allotment by the Act of April 21, 1904, Chap. 1402, 33 Stat. 204.

That an Indian Tribe or a member thereof is incapable of making a valid conveyance of tribal lands was declared by this court in the case of *Johnson* v. *McIntosh*, 8 Wheat. 543, and has ever since been adhered to, and the rule has been applied, regardless of the character of the tribal title. This policy has found statutory expression in Sections 2116 and 2118 of the Revised Statutes of the United States.

Conveyances by Indians, members of the Five Civilized Tribes, of their interest in unallotted tribal land, has been held void and incapable of

passing any interest by the Indian Territory Court of Appeals in the following cases:

Case v. *Hall* (1898), 46 S. W. 181.
Rogers v. *Hill* (1901), 164 S. W. 536.
Turner v. *Gilliland* (1903), 76 S. W. 253.
Denton v. *Capital Townsite Co.* (1904), 82 S. W. 853.
Harris v. *Hardridge* (1907), 104 S. W. 826.
Kelly et al. v. *Harper* (1907), 104 S. W. 829.
Sayer v. *Brown* (1907), 104 S. W. 877.
Hayes v. *Barringer* (1907), 104 S. W. 937.

By the Circuit Court of Appeals for the Eighth Circuit as applying to a will in *Hayes* v. *Barringer,* 168 Fed. 221.

In *McKee* v. *Henry,* 201 Fed. 75, there was not involved a conveyance, but the court there held that there was no inheritable, and therefore no inalienable interest prior to the allotment.

We submit that it also necessarily follows from the decision of this court in *Stephens* v. *The Cherokee Nation,* 174 U. S. 445; in *Gritts* v. *Fisher,* 224 U. S. 640, and in *Muskrat* v. *United States,* 219 U. S. 346, that a member of either of the Five Civilized Tribes had no interest in tribal lands prior to allotment subject to alienation.

The Circuit Court of Appeals for the Eighth Circuit has also announced the same conclusion in the case of *Woodbury* v. *U. S.*, 170 Fed. 312, and in the case of *Ligon et al.* v. *Johnson et al.*, 104 Fed. 670.

This discloses a uniform line of decisions by every court having to deal with the subject matter, that the interest of a Tribal Indian in the lands of the Tribe is not subject to alienation. This court has specifically declared, construing the Choctaw-Chickasaw Treaties under which the Tribes held title to the Tribal lands, interest in which was sought to be conveyed by Emmer Sisney to the plaintiff, that such lands are liable to no transfer or alienation except to the United States or with their consent.

We quote as follows from the opinion of this court in the case of *Fleming* v. *McCurtain*, 215 U. S. 56, 57:

> "The plaintiffs found their claim upon the Choctaw treaty of Dancing Rabbit Creek, Sept. 27, 1830, article 2, 7 Stat. 333 and letters patent of March 23, 1842, coupled with a treaty between the Choctaws and Chickasaws of Jan. 17, 1837, ratified by the Senate March 24, 1837, 11 Stat. 573. By article 2 of the treaty of 1830 'the United States under a grant specially to be made by the President of the United States,

shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it;' with the boundaries. The letters patent recite this article, and 'in execution of the agreement, grant the described tract, to have and to hold the same as intended to be conveyed by the aforesaid article fee simple to them and their descendants to inure to them while they shall exist as a nation and live on it,' *'liable to no transfer or alienation* except to the United States or with their consent.' The treaty with the Choctaws gave the Chickasaws a district within the limits of the Choctaws' country, 'to be held on the same terms that the Choctaws now hold it, *except the right of disposing of it*, which is held in common with the Choctaws and Chickasaws to be called the Chickasaw district of the Choctaw Nation.'" (Italics ours.)

The Supreme Court of the State of Oklahoma, in the case of *Bledsoe* v. *Wortman et al.*, 35 Okla. 261, 129 Pac. 841, held that a conveyance by a Creek freedman, subsequent to the Act of April 21st, 1904, *supra*, but prior to allotment, was absolutely void, incapable of ratification, and that such conveyance could not be the basis for an application of the doctrine of relation. The opinion presents such an exhaustive consideration of the entire subject that we hesitate to quote from any particular part of it. We desire, how-

ever, to call the Court's attention to the following brief extract therefrom as particularly pertinent and in reason conclusive of the questions here involved:

> "If no such interest had vested that could be inherited until after the allotment, certainly no equitable title to the land in controversy vested until after allotment. It was upon the theory that an equitable estate had vested before the issuance of patent that conveyances prior to the issuance of patent were sustained. *Goat et al.* v. *United States, supra; Godfrey* v. *Iowa Land & Trust Co., supra; McWilliams Inv. Co.* v. *Livingston et al., supra.* This holding confirms our construction of the provision from Act April 21, 1904, above set out. If prior to allotment the members of the tribe had no such vested interest as could be inherited, obviously Congress did not remove the restrictions against alienation, so as to permit such member to alienate his land before it was allotted to him; for in the exercise of its guardianship over the Indians it was certainly the contemplation of the federal government that in the alienation of his land he should receive a consideration therefor commensurate with its reasonable value. If by removal of restrictions he were permitted to sell his prospective allotment when 'it was a mere float—giving him the right to no specific property'—such a policy would not be conducive to bring about salutary results in favor of the member of the tribe, to the end that he should receive his equal share in the allotment of lands, and the same be alienated under conditions that would reasonably bring

him a consideration commensurate to its reasonable value."

Act of April Twenty-first, 1904, Not Applicable to Tribal Lands.

It was plaintiff's contention in the court below, and we presume will be here, that the making of the conveyance relied upon by the plaintiff was authorized by the following provision of the Act of April 21, 1904 (Chapter 1402, 33 Stat. 204):

> "And all the restrictions upon the alienation of lands of all *allottees* of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon alienation of all other *allottees* of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary, be removed." (Italics ours.)

We have italicized what we consider the controlling provisions of this statute.

Who is permitted to alienate by this provision, and what is permitted to be alienated? First, *allottees* who are not of Indian blood and are not minors, are permitted to alienate their surplus allotment; second, *all other allottees* except minors may alienate their *surplus allotments* with the approval of the Secretary of the Interior. The

statute does not permit the alienation by any member of the Five Civilized Tribes who is not of Indian blood of his interest in the tribal property. Restrictions are removed and authorized to be removed only as to allottees and as to lands selected in allotment. All restrictions upon alienation continue as long as the property continues to be tribal property. The restrictions upon the right to alienate so far as the surplus of the intermarried white citizen is concerned ceases upon the selection of the land in allotment. Prior to that time the lands are not alienable and the restrictions upon the right to alienate by the allottee are not removed. Both of these barriers stand directly in the way of the validity of the conveyance relied upon by the plaintiff.

To allot means "to set apart to a person a distributive share." (Anderson's Law Dict., p. 51; 2 Cyc., p. 134.)

In order to sustain the contention of the plaintiff it is necessary to make the Act of April 21st, 1904, read, "and all the restrictions upon the alienation of lands of all the *members* of the Five Civilized Tribes, etc., * * * " instead of as it now reads, "and all restrictions upon the alien-

ation of lands of all the *allottees* of the Five Civilized Tribes, etc., * * *." In other words, in order to sustain the plaintiff's contention it is necessary to strike from the statute the word "allottees" and insert the word "members," and even this would hardly sustain the plaintiff's conveyance, because Emmer Sisney, at the time she executed the same, was not a member, but a mere claimant for membership, and was not in possession of the lands involved, nor claiming possession thereof.

If Congress, however, had intended to confer the right of alienation upon mere members or claimants to membership in the trile, it could have found language adequate to express that intention, and no doubt would have done so. Congress was certainly aware that the work of allotment was in progress; that allotments had been made to certain members, but not to all of the members of the several tribes. Congress, therefore, undoubtedly intended to limit the right of alienation to allottees and to lands selected in allotment. That Congress intended that the Act of April 21, 1904, should apply to allottees only is evidenced by the proviso to Section 19 of the

Act of April 26th, 1906, 34 Stat. 137-144, Chap. 1876, the proviso declaring:

> "That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby declared void."

The interpretation herein contended for is the one which necessarily follows from the opinion of this court in *Goat* v. *United States*, 458-478; *Deming Investment Co.* v. *United States*, 224 U. S. 471; *Mullen* v. *United States*, 224 U. S. 448; *Heckman* v. *United States*, 224 United States 413.

The Conveyance Under Which Plaintiff Claims Being Void, the Judgment of the Supreme Court of the State of Oklahoma should be Affirmed.

If the conveyance from Emmer Sisney, under which the plaintiff claims is void because made before the lands were alienable, or before the restric-

tions upon the right to alienate such land had been removed, the judgment of the Supreme Court of the State of Oklahoma should be affirmed.

Tiger v. *Western Inv. Co.*, 221 U. S. 286.
Heckman v. *United States*, 224 U. S. 413.
Mullen v. *United States*, 224 U. S. 448.
Goat v. *United States*, 224 U. S. 458.
Deming Inv. Co. v. *United States*, 224 U. S. 471.
Simmons v. *Whittington*, 27 Ok. 356; 112 Pac. 1008.
Hooks et al. v. *Kennard*, 28 Ok. 457; 114 Pac. 744.
Howard v. *Farrar*, 28 Ok. 490; 114 Pac. 695.
Smith & Steele v. *Martin*, 28 Ok. 836; 115 Pac. 866.
Bledsoe v. *Wortman*, 35 Okla. 261; 129 Pac. 841.

Nor can such a conveyance be made effective on the doctrine of relation. *Starr* v. *Long Jim*, 227 U. S. 613; *Monson* v. *Simonson*, 34 Sup. Ct. R. 71; *Bledsoe* v. *Wortman*, 35 Okla. 261, 129 Pac. 841.

This is especially true when it is considered that at the time of the making of the conveyance under which plaintiff claims, Emmer Sisney was not even an enrolled member of the tribe. She had

neither selected nor attempted to select in allotment the lands conveyed. She had not the right to select the same because of her occupancy thereof. She had done absolutely nothing whatever looking to the segregation of the said land and the selection of the same in allotment. Alienation of such land was prohibited because it was tribal property.

The act of April 21st, 1904, did not apply because Emmer Sisney was not an *allottee* and did not come within the terms of the act. The conveyance was therefore absolutely void and cannot be the basis of the application of the doctrine of relation.

As to the Contention Found in Brief for Plaintiff in Error.

All of the material issues and authorities properly applicable thereto have heretofore been considered in this brief. There are certain cases cited in the brief from plaintiff in error and certain deductions drawn for the language used in these cases to which we desire to call attention.

The first of these cases to which we desire to direct the attention of the Court is that of *Doe* v. *Wilson*, 23 How. 457, 64 U. S. 584. The land involved in that case was that granted to Pet-chi-co

under Article 3 of the Pottowatomie Treaty of October 27, 1893 (7 Stat. 399). Article 3 of that treaty is as follows:

> "The United States agrees to grant to each of the following persons the quantity of land annexed to their names, which land shall be conveyed to them by patent: * * * To Pet-chi-co, two sections: * * *"

The treaty as a whole constitutes a reservation in favor of and a grant to Pet-chi-co of two sections of land without restrictions or alienation. It constitutes a present grant of land to be thereafter located.

It is in no wise similar to the controversy herein involved. The same is true with reference to the case of *Crews* v. *Burcham*, 1 Black 352, and *Jones* v. *Meehan*, 175 U. S. 1, and other cases cited in the brief for plaintiff in error.

The rule has been clearly established by the opinions of this Court, of the Circuit Court of Appeals for the Eighth Circuit, of the Supreme Court of the State of Oklahoma, of the Court of Appeals for the Indian Territory, that conveyances made in violation of legislation imposing restrictions upon alienation are void; that the purpose of such legislation is not only to prevent alienation during

the restricted period, but to prevent the encumbrance of the restricted land by deed or contract during the period when alienation is prohibited from being effective after the expiration or removal of restrictions. *Tiger* v. *Western Inv. Co.*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738; *Heckman* v. *United States*, 224 U. S. 413, 32 Sup. Ct. 424, 56 L. Ed. 820; *Goodrum* v. *Buffalo*, 162 Fed. 817, 89 C. C. A. 525; *Hayes* v. *Barringer*, 168 Fed. 121, 93 C. C. A. 507; *Lewis* v. *Clements*, 21 Okl. 167, 95 Pac. 769; *Howard* v. *Farrar*, 28 Okl. 490, 114 Pac. 695; *Simmons* v. *Whittington*, 27 Okl. 356, 112 Pac. 1018; *Harper* v. *Kelly*, 29 Okl. 809, 120 Pac. 293; *Turner* v. *Gilliland*, 4 Ind. T. 606, 76 S. W. 253; *Denton* v. *Capital Townsite Co.*, 5 Ind. T. 396, 82 S. W. 853; *Sayre* v. *Brown*, 7 Ind. T. 675, 104 S. W. 877; *Harris* v. *Hardridge*, 7 Ind. T. 532, 104 S. W. 826.

It is respectfully submitted that the contentions of the plaintiff in error are without merit; that the judgment of the Supreme Court of the State of Oklahoma is in all things correct and should be affirmed.

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